Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF THE DALLES,
a political subdivision of the State of Oregon,

Petitioner,

v.

T.R.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Is a state court exercising jurisdiction over a cause of action based upon 42 U.S.C. Section 1983 required to apply federal law when determining the accrual date of the Section 1983 cause of action, without reference to state law?

B. Assuming the answer to the first question is yes, can a state court exercising jurisdiction over a Section 1983 claim use state accrual case law, instead of federal law, to determine the accrual date of a Section 1983 action under the guise that state accrual law is a tolling provision that applies to Section 1983 actions?

C. Assuming the answer to the second question is no, and this Court holds that a state must apply federal law when determining the accrual date of a Section 1983 cause of action in state court, was plaintiff's Section 1983 cause of action against the City of The Dalles time-barred when the action was filed more than seven years after the plaintiff was injured, more than six years after the plaintiff turned 18, and more than four years after the plaintiff turned 19?

LIST OF PARTIES TO THE PROCEEDINGS, CORPORATE DISCLOSURE STATEMENT

In the proceedings before the Oregon Supreme Court, the Petitioner on Review was Plaintiff T.R. The Respondent on Review was Defendant City of The Dalles, Oregon, a governmental corporation. None of the parties are non-governmental corporations.

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CITATIONS TO ORDERS/OPINIONS

On April 19, 2006, the Court of Appeals for the State of Oregon, applying federal accrual law, found that the plaintiff's Section 1983 claims against the City of The Dalles were time-barred. *T.R. v. Boy Scouts of America*, 205 Or. App. 135, 133 P.3d 353 (Or. App. 2006). On March 13, 2008, the Supreme Court of Oregon, applying its state accrual law, reversed the Court of Appeals. *T.R. v. Boy Scouts of America*, 344 Or. 282, 181 P.3d 758 (Or. 2008).

BASIS FOR JURISDICTION

The Supreme Court of Oregon filed its opinion on March 13, 2008. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). This petition for a writ of certiorari is being filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) and Rule 13 of the Court, as computed in accordance with Rule 30 of the Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is Section 1. of the Fourteenth Amendment to the United States Constitution. The federal statute authorizing civil actions for the deprivation of civil rights is 42 U.S.C. § 1983.

Section 1. of the Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The City of The Dalles maintained a Police Explorer Scout program, entitled the "City of The Dalles Police Explorer Unit." While an Explorer, the plaintiff kept a folder concerning the Explorer

program. The plaintiff's Explorer folder contained the Explorer Manual, Rules of Conduct, notes, calendars, and photographs of plaintiff's participation in the program.

The plaintiff's Explorer notebook explained the involvement of the City of The Dalles in the Explorer program, and illustrates what the plaintiff knew about the City's involvement in the program. It also illustrates that the plaintiff, himself, was an agent of the City as an Explorer Scout.

When acting as an Explorer, the plaintiff would wear a uniform with the City of The Dalles Police Patch. As an Explorer, the plaintiff attended functions in Las Vegas, Richland, and Arizona. At all of those functions, he represented the City of The Dalles.

Explorer Scouts were supervised by Police Officers employed by the City of The Dalles Police Department, and were taught basic police procedures. As part of their training, Explorer Scouts would often accompany police officers on "ride alongs" in which the Explorer Scout would ride with a police officer in a patrol car while the officer was on duty.

The plaintiff became an Explorer in 1995, when he was sixteen. Defendant James Tannehill, a City of The Dalles Police Sergeant, was the Explorer Advisor in charge of the City of The Dalles Police Explorer program at the time the plaintiff became an Explorer. City Police Officers Jeff Halter and Dan Nelson were also advisors. Tannehill stopped his involvement with

the Explorers in early fall of 1996. The plaintiff resigned from the Explorers in December of 1996.

Plaintiff's first contact with Defendant Tannehill occurred in October of 1995, when he met Tannehill at a local gym in the City of The Dalles. Other City of The Dalles officers also worked out at this gym. At Tannehill's suggestion, the plaintiff submitted an application to the Explorer program. The plaintiff was then interviewed by several police officers, including Tannehill and Police Captain Waterbury. After interviews, the plaintiff was accepted into the program. At the time, the plaintiff was 16 years old. His date of birth is March xx, 1979.

While an Explorer, the plaintiff was told that if he had any problems with Tannehill to "know your chain of command."

Near to this time, the plaintiff arranged a meeting between Defendant Tannehill and the plaintiff's grandmother, Betty Hartung, in which they discussed the program. Betty Hartung was the grandmother of the plaintiff (the mother of the plaintiff's mother). The plaintiff started living with Ms. Hartung full time when the plaintiff turned 16.

When Ms. Hartung had moved to The Dalles, she was told by a neighbor that Tannehill was gay. After the meeting, Ms. Hartung warned the plaintiff that it was rumored that Tannehill was gay.

The sexual contact between Defendant Tannehill and the plaintiff occurred between January and

March of 1996. Sexual contact occurred while both Tannehill and the plaintiff were on duty. Sexual contact also occurred while both were off duty. After March of 1996, there was no further sexual contact between the plaintiff and Tannehill. The plaintiff never reported any of Defendant Tannehill's sexually abusive acts to any City of The Dalles Police Officers.

Ms. Hartung became aware of touching by Tannehill while the plaintiff was an Explorer, after the plaintiff told her. As she testified at trial:

> "And Tim had come home from working there, Jim Tannehill made me so angry. I said, What's he doing? Oh, he's posturing and doing that. It just makes me sick. I just told him, you're gay, I'm not, okay? And then at one point, he said he touched him on the leg. Well, you now, Tim, do you want me to step in? No, Grandma. I don't know what – no, I can handle it."

Plaintiff was aware of the wrongful nature of Defendant Tannehill's contact; he knew the conduct was a crime; and he knew that he was the victim of a crime:

> "Q. Question: Did you know at the time this was occurring, these activities that you told us in some detail about between yourself and Mr. Tannehill, that what he was doing to you was sexual abuse?
>
> A. I did.

Q. Did you know what he was doing to you was a crime?

A. I did.

. . . .

Q. So you're the victim of that crime?

A. Yes, sir."

On December 29, 1996, the plaintiff resigned from the Explorer Scout program. In January, 1997, at the age of 17, the plaintiff left the City of The Dalles to begin basic training in the United States Army. Plaintiff's military service took him to South Carolina.

In June, 1997, while still in the Army, the plaintiff returned to The Dalles to walk with his high school graduating class. By this time, the plaintiff was 18 years old. During this time, the plaintiff visited with Defendant Tannehill.

On May 16, 1998, when he was 19 years old, the plaintiff got married. In February, 1999, the plaintiff was discharged from the Army for medical reasons.

Between 1996, and 2000, the plaintiff held several positions where he received sexual harassment training. These positions included the Army and Providence Hospital. The plaintiff noted twice his sexual harassment training in an application for a position at a car dealership.

In May, 2000, at the age of 21, the plaintiff moved to Washington. While the plaintiff and his wife

were living in the State of Washington, they applied for certificates to become foster parents. After receiving his certificate, the plaintiff became a "mandatory reporter" under Washington law. As a certified mandatory reporter, he was required to report any instances of potential child abuse.

After moving to Washington in 2000, the plaintiff met Defendant Tannehill in Portland, Oregon, on two occasions. On the second occasion, they visited Gay clubs.

On July 7, 2003, the plaintiff filed his First Complaint that contained a Section 1983 claim against the City. At the time, the plaintiff was 24 years old. As to Defendant Tannehill, the plaintiff alleged a common law battery claim, and a federal constitutional claim based upon an alleged violation of 42 U.S.C. § 1983. As to the City of The Dalles, the plaintiff alleged a common law battery claim based upon a *respondeat superior* theory, and a federal constitutional claim based upon an alleged violation of 42 U.S.C. § 1983. Prior to the trial, the court dismissed the state tort claim against the City as time-barred.

The parties agreed that plaintiff's Section 1983 cause of action was controlled by a two-year statute of limitations, and this agreement is constitute with the law of the Ninth Circuit. *Sain v. City of Bend*, 309 F.3d 1134 (9th Cir. 2002). In its motion for summary judgment on the issue of the statute of limitations as to the Section 1983 claim, the City argued that

federal law controlled when the date of accrual took place, (App. 45) and that under federal law, the claim was barred because the claim accrued before July 7, 2001 (July 7, 2001 plus two years equals July 7, 2003, the date of the filing of the Section 1983 action). (App. 45-50). The trial court denied the motion with the understanding that the issue could be raised again at a later date.

The trial commenced on April 20, 2004. Prior to picking the jury, Defendant Tannehill moved to have plaintiff's Section 1983 claim against him dismissed because the Section 1983 claim was barred by the applicable two-year statute of limitations. The plaintiff conceded that his Section 1983 claim against Tannehill was barred by the two-year statute of limitations.

Likewise, on the first day of trial, the City of The Dalles moved to have the plaintiff's Section 1983 claim against it dismissed on the grounds that the applicable two-year statute of limitations barred the claim. However, the trial court denied the motion. Again, at that time, the City argued that federal law controlled the date of the accrual of the Section 1983 claim. (App. 63).

At trial, the plaintiff took the position that Tannehill was a policymaker for the City; (App. 68, 71) thus, rendering the City directly liable for Tannehill's conduct, without any proof that a policy or custom caused plaintiff any damage. (App. at 75-77).

At the close of the evidence, Defendant City of The Dalles moved for a directed verdict on the grounds that the plaintiff's claims under 42 U.S.C. § 1983 were barred by the two-year statute of limitations. The City argued that federal law controlled when the date of accrual took place, and under federal law, the claim was barred. (App. 73-75). The City's motion for directed verdict was denied.

The matter was then submitted to the jury. The jury instruction on the statute of limitations told the jury that if the jury found that the plaintiff's cause of action accrued prior to July 7, 2001, the plaintiff's claim was barred. (App. 79). The City argued that because the plaintiff discovered his claim prior to July 7, 2001, his claim was barred:

> "[M]y position is that at some time from 1996 to July 7, [2001] a reasonable person would have realized that they were harmed or a victim." (App. 82).

Thereafter, the jury returned a verdict in favor of the plaintiff and against the City. After judgment was entered against the City, the City appealed the judgment to the Court of Appeals for the State of Oregon.

In the Court of Appeals, the City again raised the issue of the statute of limitations. Again, the City argued that federal law applied:

> "The statute of limitations applicable to a claim under 42 U.S.C. § 1983 is Oregon's general residuary personal injury statute of limitations of ORS 12.110(1), which is a

> two-year statute of limitations. *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L.Ed.2d 594 (1989); *Sain v. City of Bend*, 309 F.3d 1134, 1139-40 (9th Cir. 2002). The purpose of a statute of limitation is to prevent assertion of stale claims against a defendant. *Azer v. Connell*, 306 F.3d 930, 937 (9th Cir. 2002).
>
> To determine when the plaintiff's § 1983 cause of action accrued for the purposes of the statute of limitations, this Court must apply federal law. *Johnson v. State of Cal.*, 207 F.3d 650, 653 (9th Cir. 2000). 'Under federal law, a claim accrues when the plaintiff knows, or should known [sic], of the injury which is the basis of the cause of action.'" *Id.* (App. 87).

The Oregon Court of Appeals agreed with the City. Using federal law for the determination of the accrual date of the plaintiff's Section 1983 claim (App. 34), the Court of Appeals found that the plaintiff's claim was time-barred. (App. 38-39).

After the decision of the Court of Appeals, the plaintiff filed a Petition for Reconsideration with the Court of Appeals. (App. 94). The plaintiff argued that the Court of Appeals should have used the state law of Oregon for the determination of the accrual date of plaintiff's Section 1983 claim, because the discovery rule applicable to Oregon's accrual law was a tolling provision. (App. 96). That is, the plaintiff requested reconsideration contending that Oregon's accrual law should be applied as a tolling provision. The question

presented to the Court of Appeals by Plaintiff's Petition for Reconsideration was stated as follows:

> "A. Does the Oregon discovery rule – applicable to ORS 12.110(1) under *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966) – serve to toll the running of the statute of limitations in a Section 1983 suit following federal accrual of the claim?" (App. 98).

In other words, the plaintiff was conceding that under federal law, his claim had accrued and was time-barred. However, the plaintiff argued that after the federal claim accrued, it was then tolled until the claim accrued under the state law of Oregon, because the accrual law of Oregon was a tolling provision.

The City responded that federal law determines the accrual date of a Section 1983 action:

> "Second, Oregon's discovery rule is a rule applied by the Oregon courts to determine when a cause of action of a state claim accrues. The federal discovery rule is a rule applied by the federal courts to determine when a cause of action of a federal claim accrues. Because federal law, not state law, is used to determine when a Section 1983 action accrues, this Court was correct in applying the federal discovery rule, and not the Oregon discovery rule." (App. 102).

The Court of Appeals denied the Plaintiff's Petition for Reconsideration without an opinion. Thus, by implication, the Court of Appeals rejected the plaintiff's contention that a state court could

circumvent federal accrual law under the guise that a state's accrual law was a tolling provision.

The plaintiff then filed his Petition for Review with the Supreme Court of Oregon. (App. 104). In his Petition, the plaintiff again argued that the Court of Appeals should have applied Oregon's discovery rule as a tolling provision. (App. 105).

The City objected to the granting of the Petition, again, arguing that the Supreme Court of Oregon could not apply Oregon's accrual discovery rule under the guise that it was a tolling provision. (App. 108).

After the Supreme Court of Oregon accepted review of the case, the plaintiff once again argued that Oregon's accrual law applied as a tolling provision: "Oregon's Discovery Rule Is a Tolling Doctrine as That Term Is Understood in the Section 1983 Context." (App. 112).

The City responded by stating that: "The Plaintiff Cannot Circumvent the Federal Rule of Law that Determines when a Section 1983 Claim Accrues and the Statute of Limitations begins to Run, by Applying Oregon's Law of Accrual by Characterizing Oregon's Accrual Law as a Tolling Provision." (App. 114).

The Attorney General of the State of Oregon, appearing with an *Amicus Curiae* Brief, also argued that Oregon's discovery rule does not apply to a Section 1983 claim, and that "Oregon's discovery rule is not a tolling provision." (App. 120).

In its brief to the Supreme Court of Oregon, the City also pointed out that it did not think that this Court would go along with such a finding:

> "Defendant strongly doubts that the Supreme Court of the United States is going to allow such a result in any court in any state of the United States." (App. 116).

The Supreme Court of Oregon accepted plaintiff's argument; and rejected the City's position and the position of Oregon's Attorney General. Then using state law, the Supreme Court of Oregon found that the plaintiff's claim was not time-barred. At oral argument, the Supreme Court of Oregon made it clear to the parties that it was not going to allow federal law to play any part in its decision as to when a cause of action accrued in an Oregon Court:

> "JUSTICE GILLETTE: You know, we're in an odd spot in that regard and I need to have your explanation about this. *Plumeau* is a ninth circuit decision ultimately and neither the state legislature nor we are bound by it except with respect to the facts of the specific case.
>
> I mean, it may purport to state all kinds of general propositions of the law but the short answer to that nonsense.
>
> MR. CLARK: That's right.
>
> JUSTICE GILLETTE: Nice to have your opinion. Drop by when you have a better idea.

MR. CLARK: That's right.

JUSTICE GILLETTE: And so it's not binding on us. It's not binding on any of God's children except the federal court's themselves.

Mr. Clark: That's right.

JUSTICE GILLETTE: So you keep talking about it. Mr. Franz keeps talking about it. My attitude is ho hum. I don't care what it says. Unless it inherently persuades, it's a nothing. And you admit that, do you not?

MR. CLARK: Yes, I do. I do." (App. 123-24).

In other words, the federal law to the Supreme Court of Oregon is "ho hum." Federal law as precedence in establishing the date of accrual in a Section 1983 action is "Nice to have your opinion. Drop by when you have a better idea."

REASONS FOR GRANTING THE WRIT

State courts exercising jurisdiction over a Section 1983 claim must follow the federal accrual rule without reference to state law; not a state court accrual rule. This Court has made it clear to the federal courts that the accrual date of a Section 1983 action is a question of federal law that is not resolved by reference to state law. *Wallace v. Kato*, 127 S. Ct. 1091, 1095, 166 L.Ed.2d 973 (2007):

> "While we have never stated so expressly, the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law. The parties agree, the Seventh Circuit in this case so held, *see* 440 F.3d at 424, and we are aware of no federal court of appeals holding to the contrary. Aspects of § 1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles. *See Heck*, *supra*, at 483, 114 S. Ct. 2364; *Carey v. Piphus*, 435 U.S. 247, 257-258, 98 S. Ct. 1042, 55 L.Ed.2d 252 (1978). Under those principles, it is 'the standard rule that [accrual occurs] when the plaintiff has "a complete and present cause of action."' *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542, 139 L.Ed.2d 553 (1997) (*quoting Rawlings v. Ray*, 312 U.S. 96, 98, 61 S. Ct. 473, 85 L.Ed. 605 (1941)), that is, when 'the plaintiff can file suit and obtain relief,' *Bay Area Laundry*, *supra*, at 201, 118 S. Ct. 542. There can be no dispute that petitioner could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention, so the statute of limitations would normally commence to run from that date."

This Court now must make it clear to the state courts that when a state court is exercising its jurisdiction over a Section 1983 claim, the accrual date of the Section 1983 action is a question of federal law

that is not resolved by reference to state law. Especially, to those states like Oregon that have the attitude that federal precedence is "ho hum," and federal law is "Nice to have your opinion. Drop by when you have a better idea." And where the highest court of the state expressly states in open court that federal law is "not binding on us. It's not binding on any of God's children except the federal court's themselves."

Obviously, if a state is allowed to use its own accrual rules in a Section 1983 action, then there will be inconsistent applications of the law in determining the accrual date of a Section 1983 claim between federal and state courts, especially, as illustrated in the case at bar where the reasoning of the Oregon Supreme Court has the practical effect of there being no statute of limitations for a Section 1983 action filed in the State of Oregon against a City; when, in the same lawsuit, the state tort claim against the City was time-barred (the lower court dismissed the tort claim against the City of The Dalles because it was time-barred).

In addition, the rule used by the Oregon Supreme Court was applied even though the plaintiff complained that the tortfeasor was a policymaker. This has produced the absurd result that the tortfeasor is free of liability because the statute expired as to him, but his same conduct as a policymaker renders the City liable without being barred by the statue of limitations.

There is no doubt in this case that the plaintiff could have filed his Section 1983 claim against the City when the misconduct occurred in 1996, when he knew the conduct was illegal and took place when Tannehill was on duty. He also could have filed the lawsuit in his own name when he turned 18, which was March xx, 1997. Or if the minority tolling rule of Oregon is applied (a minor has one year from the date he turns 18 to commence a lawsuit – ORS 12.160(2)), the plaintiff could have filed his lawsuit in his own name anytime within the one year after he turned 18, which would have been anytime between March 25, 1997, to March 25, 1998. Or he could have filed his claim in his own name anytime from age 19 to age 22, which would have been from March 25, 1998, to March 25, 2001. All of these dates are well before July 7, 2001, the date occurring two years prior to the date that the plaintiff filed his Section 1983 claim against the City (plaintiff filed his Section 1983 claim against the City on July 7, 2003).

Thus, by applying federal law to determine the accrual date in the case at bar, the plaintiff's claim was barred as held and explained by the Oregon Court of Appeals. *Wallace v. Kato*, 127 S. Ct. 1091 [that is, when "the plaintiff can file suit and obtain relief," or when the plaintiff has "a complete and present cause of action"); *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 145 L.Ed.2d 1047 (2000); *United States v. Kubrick*, 444 U.S. 111, 113-14, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979). This is especially true in the case at bar where the plaintiff contended that

Tannehill was a policymaker, and the lower court dismissed the plaintiff's Section 1983 claim against Tannehill because it was barred by the two-year statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Filed: March 13, 2008

IN THE SUPREME COURT OF
THE STATE OF OREGON

T. R.,

Petitioner on Review,

v.

THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL,

Defendants,

and

CITY OF THE DALLES,
a political subdivision of the State of Oregon,

Respondent on Review.

(CC 0206-05750; CA A125742; SC S054071).

En Banc

On review from the Court of Appeals.*

Argued and submitted June 19, 2007.

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* Appeal from Multnomah County Circuit Court, Alicia Fuchs, Judge.
205 Or App 135, 133 P3d 353 (2006).

Kelly Clark, O'Donnell & Clark, LLP, Portland, argued the cause for petitioner on review. With him on the briefs were Kristian Roggendorf and Jonathan Clark.

Robert E. Franz, Jr., Law Offices of Robert E. Franz, Jr., Springfield, argued the case for respondent on review. With him on the briefs was Jason M. Montgomery.

Christina M. Hutchins, Assistant Attorney General, Salem, submitted a brief on behalf of *amicus curiae* State of Oregon.

WALTERS, J.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review

[ ] No costs allowed.
[X] Costs allowed, payable by: Respondent on Review
[ ] Costs allowed, to abide the outcome on remand, payable by:

WALTERS, J.

Under 42 USC section 1983, plaintiff brought a claim against defendant City of The Dalles[1] (city). Plaintiff asserted that the city's deliberate indifference to his right under the Fourteenth Amendment to the United States Constitution to be free from sexual abuse by a governmental actor constituted a city policy that caused him to be subjected to sexual abuse by a city police officer. The question before us is whether there was evidence from which a reasonable jury could have found, as the jury in this case did, that plaintiff timely filed his Section 1983 claim. The city contends that plaintiff's Section 1983 claim against the city necessarily accrued in 1996, when the officer, Sergeant James Tannehill, committed the acts of sexual abuse, and that plaintiff did not file his claim within the requisite time thereafter. Plaintiff contends that his Section 1983 claim against the city did not accrue until he discovered or should have discovered that the city had a role in causing his injury, that that date was a question of fact for the jury, and that a reasonable jury could have found that plaintiff reasonably did not discover the city's role in 1996.

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[1] Plaintiff also brought claims against the Boy Scouts of America, Cascade Pacific Council, and James Donald Tannehill. Before trial, the court dismissed plaintiff's claims against the Boy Scouts and Cascade Pacific Council. At trial, plaintiff obtained a verdict against Tannehill. The court entered judgment against Tannehill and he did not appeal from the judgment entered against him.

The trial court agreed with plaintiff that the city's statute of limitations defense required resolution of a question of fact and denied the city's motion for a directed verdict. The Court of Appeals agreed with the city that plaintiff's claim necessarily accrued when Tannehill committed the acts of abuse, concluded that the trial court erred in denying the city's motion, and reversed the judgment against the city. *T. R. v. Boy Scouts of America,* 205 Or App 135, 133 P3d 353 (2006). We allowed plaintiff's petition for review and now reverse the decision of the Court of Appeals and remand the case to that court for further proceedings.

To analyze the opposing contentions, we begin with the facts established at trial, viewing them in the light most favorable to plaintiff. *Boothby v. D.R. Johnson Lumber Co.,* 341 Or 35, 38, 137 P3d 699 (2006). We set forth in some detail the facts upon which plaintiff relied to establish the city's role in causing the harm he suffered, because it is that role that plaintiff asserts he reasonably did not discover until after 1996.

The city police department created and operated an Explorer Scout program. That program was a unit or post of the Cascade Pacific Council, which is a chartered organization of the Boy Scouts of America. The purpose of the city's Explorer Scout program was to introduce teens to law enforcement by educating them about and involving them in police operations. The Boy Scouts of America and the Cascade Pacific Council (together referred to as the Boy Scouts)

devised and disseminated policies and procedures to protect participants in their programs from exploitation and sexual abuse. Components of those policies and procedures included the training and education of adults and youth in recognizing, resisting, and reporting sexual abuse. One of the primary Boy Scout mandates is that its programs set up oversight committees to ensure their proper management and supervision.

The Boy Scouts advised the city of its policies and procedures and their importance in preventing child sexual abuse, but the city did not implement or follow them. For instance, the Boy Scouts required that any Explorer program that sent participants to a regional or national conference conduct extensive youth protection training. The city sent participants to such a conference, but did not conduct youth protection training. The city did not caution its officers or Explorers against the dangers of sexual abuse or teach them how to recognize or report sexual abuse. Without training him for the position, the city delegated authority to run the Explorer program to Tannehill, the officer who sexually abused plaintiff. Although the city created an oversight committee "on paper," in reality, as a city officer admitted, it did not exist. The city included a prohibition on fraternization between officers and Explorers in its Explorer Manual, but did not otherwise instruct Tannehill or other officers that they were not to socialize with Explorers outside of authorized program activities. Moreover, when city officials learned that its officers were engaging in

misconduct, such as regularly spending time alone with Explorers and serving them alcohol, the city tolerated and did not discourage the officers' violations. In one instance, when the city learned that an officer was "having an affair" with an Explorer, the department delayed and created impediments to a fair and full investigation and, thereafter, continued to operate the program, unchanged, without protection or oversight.

Plaintiff was 16 years old and living in foster care when Tannehill approached him at a gym, commented on his physique, and suggested that he enroll in the Explorer program. Plaintiff was flattered by the attention. The program offered him a chance to pursue his dream of becoming a police officer and, as plaintiff testified, "It was the most [he'd] ever been needed in [his] life." Shortly after joining the program, Tannehill began spending time alone with plaintiff, on and off duty, during and outside of regular Explorer activities, at Tannehill's home, at the gym, and in Tannehill's car. Tannehill regularly served plaintiff alcohol and made sexual comments to him. After a period of time, Tannehill began touching plaintiff inappropriately, and, ultimately, sexually molested him. Plaintiff was confused about whether what was happening to him was normal. He asked two other city police officers about Tannehill's serving him alcohol and whether Tannehill had an interest in boys. One just laughed, the other told him he didn't want to talk about it. When plaintiff tried to distance himself from Tannehill, Tannehill became angry and

used threats and intimidation to coerce continued contact. As soon as he could, plaintiff took an early high school graduation and joined the army.

Plaintiff was 22 years old and working in Washington state when, in October 2001, his grandmother read him a newspaper article that reported that the Oregon State Police had arrested an officer from The Dalles (not Tannehill) on charges of serving alcohol to a minor. The newspaper article included a number to call to provide information. Plaintiff responded, and in answers he gave during in-person and phone interviews by the state police over the next few weeks, disclosed Tannehill's actions. Within the month, plaintiff attended grand jury proceedings concerning Tannehill and found that many city officers were also present to testify. Based on statements those officers made and questions the grand jury asked, plaintiff suspected for the first time that department members, and perhaps even command staff, may have permitted the sexual abuse that Tannehill had committed and failed to protect Explorers, including himself, against such abuse. Plaintiff filed his Section 1983 claim against the city on July 7, 2003, within two years of those October 2001 events.

At trial, the city moved for a directed verdict, asserting, as one basis for its motion, that the uncontroverted evidence established that plaintiff's Section 1983 claim was barred by the statute of limitations.

The city argued that the two-year general personal injury limitations period found in ORS 12.110(1)[2] applied to plaintiff's Section 1983 claim, and that because plaintiff had not commenced his action against the city within the requisite time after Tannehill's acts,[3] his claim was barred. Plaintiff agreed that ORS 12.110(1) stated the applicable limitations

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[2] ORS 12.110(1) provides:

> "An Action for assault, battery, false imprisonment, or for any injury to the persons or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years; provided, that in an action at law based upon fraud or deceit, the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

[3] Because plaintiff was a minor, his minority was not counted in computing the two-year limitations period set forth in ORS 12.110(1). During the relevant time period, ORS 12.160 (1995) provided:

> "If, at the time the cause of action accrues, any person entitled to bring an action mentioned in ORS 12.010 to 12.050, 12.070 to 12.250 and 12.276 is:
>
> "(1) Within the age of 18 years,
>
> "(2) Insane, or
>
> "(3) Imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than the person's natural life,
>
> the time of such disability shall not be a part of the time limited for the commencement of the action; but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases."

period, but contended that he reasonably had not discovered the facts that gave rise to his Section 1983 claim against the city at the time that Tannehill committed the acts of abuse, and that the date on which his claim against the city accrued was a question of fact for the jury. The trial court agreed, denied the city's motion, and instructed the jury that, for the city to prevail on its statute of limitations affirmative defense, it was required to prove that, before July 7, 2001, "plaintiff either knew or, in the exercise of reasonable care, should have known facts which would make a reasonable person aware of the substantial possibility that the City of the Dalles caused the plaintiff some harm." The jury returned a verdict against the city and made a special finding that "plaintiff discover[ed] that he had a claim against the City of the Dalles" in October of 2001.

In the Court of Appeals, the city assigned error to the trial court's denial of its motion for a directed verdict on statute of limitations grounds. The Court of Appeals agreed with the city as to that assignment of error and reversed the judgment against the city. Applying a "discovery" accrual rule, the Court of Appeals held that plaintiff's Section 1983 claim against the city accrued, as a matter of law, in 1996, when plaintiff knew that he was injured and that Tannehill was the physical cause of his injury. The Court of Appeals reasoned that plaintiff's knowledge of his injury and its physical cause triggered a duty to inquire further into the city's role in causing that injury "by 'seeking advice in the medical and legal

community[,]' " and therefore commenced the running of the statute of limitations. *T. R.*, 205 Or App at 143 (quoting *United States v. Kubrick*, 444 US 111, 123, 100 S Ct 352, 62 L Ed 2d 259 (1979)). Because plaintiff concededly did not bring his action within the required time after Tannehill's 1996 actions, the Court of Appeals ruled that the trial court erred in denying the city's motion for a directed verdict on statute of limitations grounds. The Court of Appeals did not reach the city's other assignments of error. We allowed plaintiff's petition for review.

The Court of Appeals assumed, and the city agrees, that the appropriate accrual rule is a discovery rule. The issue that this case presents is whether the trial court properly applied that rule. If the only conclusion a reasonable jury could have reached was that plaintiff should have discovered that he had a potential Section 1983 claim against the city in 1996, when Tannehill committed the acts of abuse, the trial court erred in denying the city's motion for a directed verdict.[4] If, however, a reasonable jury could also have reached the conclusion that plaintiff reasonably did not discover the city's role in 1996, the trial court correctly denied the city's motion.

We begin our analysis with an explanation of the facts that give rise, generally, to a Section 1983 claim

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[4] It is important to note that the city does not argue here, and did not argue below, that there was some date between 1996 and 2001 when the statute of limitations began to run.

against a municipality. A municipality can be held responsible for a violation of a citizen's constitutional rights under Section 1983 when, and only when, it has a policy, custom, or usage that violates those rights. *Monell v. New York City Dept. of Social Services,* 436 US 658, 690-91, 694, 98 S Ct 2018, 56 L Ed 2d 611 (1978). A city is not liable under Section 1983 merely because it "employs a tortfeasor." *Id.* at 691. In other words, *respondeat superior* liability does not apply in Section 1983 actions. Rather, the municipality itself must be the actor, and its own actions must violate the citizen's constitutional rights. A plaintiff must prove that the municipality has adopted a policy or custom, and that the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," caused the constitutional violation. *Id.* at 694.

That policy need not be written in order to be "official":

> "[A]lthough the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments * * * may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels. As Mr. Justice Harlan, writing for the Court, said in *Adickes v. S.H. Kress & Co.,* [398 US 144, 167-68, 90 S Ct

> 1598, 26 L Ed 2d 142 (1970)]: 'Congress included customs and usages [in § 1983] because of the persistent and widespread discriminatory practices of state officials. . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'"

Id. at 690-91. Furthermore, a municipality's failure to act can constitute an official policy that gives rise to liability if that failure evidences a "'deliberate indifference' to the rights of its inhabitants." *Canton v. Harris,* 489 US 378, 388-89, 109 S Ct 1197, 103 L Ed 2d 412 (1989); *see also Board of Comm'rs of Bryan Cty. v. Brown,* 520 US 397, 407, 117 S Ct 1382, 137 L Ed 2d 626 (1997) (citing *Canton*).

In this case, plaintiff alleged, and was required to prove, that he had a constitutional right under the Fourteenth Amendment to the United States Constitution to be free from sexual abuse by a governmental actor, and that the city's deliberate or conscious disregard for that right constituted a city policy that caused him to be subjected to such abuse. *See Monell,* 436 US at 691-92 (municipality's official policy or custom must cause constitutional violation to render it liable under Section 1983); *Canton,* 489 US at 388-89 (deliberate indifference to rights of inhabitants may constitute official city policy); *Ingraham v. Wright,* 430 US 651, 673-74, 97 S Ct 1401, 51 L Ed 2d 711 (1977) (liberty interest of Fourteenth Amendment

implicated where school officials inflicted appreciable pain on a child).

As we have noted, the accrual rule that applies to determine when plaintiff's Section 1983 claim accrued is a "discovery" accrual rule. We set forth the reason for recognizing a discovery accrual rule in *Berry v. Branner,* 245 Or 307, 312, 421 P2d 996 (1966):

> "To say that a cause of action accrues to a person when she may maintain an action thereon and, at the same time, that it accrues before she has or can reasonably be expected to have knowledge of any wrong inflicted upon her is patently inconsistent and unrealistic. She cannot maintain an action before she knows she has one. To say to one who has been wronged, 'You had a remedy, but before the wrong was ascertainable to you, the law stripped you of your remedy,' makes a mockery of the law."

Following that rationale, we have held that the statute of limitations does not begin to run until a reasonably prudent plaintiff perceives both the injury and the role that the defendant has played in that injury. *S[c]hiele v. Hobart Corporation,* 284 Or 483, 490, 587 P2d 1010 (1978). In both respects Oregon law mirrors the generally applicable common-law discovery rule. Dobbs frames that rule as follows:

> "[T]he usual idea seems to be that the statute will not begin to run until

> "(a) all of the elements of the tort are present *and*
>
> "(b) the plaintiff discovers, or as a reasonable person should have discovered,
>
> "(i) that she is injured and
>
> "(ii) that the defendant, or the defendant's product or instrumentality, had a causal role in the injury, or that there was enough chance that defendant was connected with the injury to require further investigation that in turn would have revealed the defendant's connection."

Dan Dobbs, 1 *The Law of Torts, Practitioner Treatise Series* § 218, 554 (2001) (emphasis in original).

There are two aspects of the discovery accrual rule that warrant further attention. First, the limitations period begins to run as to each defendant when the plaintiff discovers, or a reasonable person should have discovered, that defendant's causal role. *See Adams v. Oregon State Police,* 289 Or 233, 237-39, 611 P2d 1153 (1980) (plaintiff knew towing company had found his car but claim against state did not accrue until later when plaintiff learned of state's causal role in the towing). When the facts that should alert a plaintiff to a defendant's role are different for different defendants, the date of accrual may also be different as to each. As one court put it, "[C]laims based on two independent legal theories against two separate defendants can accrue at different times." *E-Fab, Inc. v. Accountants, Inc. Services,* 153 Cal App 4th

1308, 1323, ___ P3d ___ (2007) (citing *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal 4th 797, 802-03, 110 P3d 914 (2005)).

Second, when a duty to investigate exists, the statute of limitations only begins to run if the investigation would have disclosed the necessary facts. *Greene v. Legacy Emanuel Hospital,* 335 Or 115, 123, 60 P3d 535 (2002) ("The period of limitations * * * commences from the earlier of two possible events: (1) the date of the plaintiff's actual discovery of injury; or (2) the date when a person exercising reasonable care should have discovered the injury, *including learning facts that an inquiry would have disclosed.*") (original emphases omitted; emphasis added). *See also* Dobbs, 1 *The Law of Torts* § 218 (statute will not begin to run until there is "enough chance that defendant was connected with the injury to require further investigation *that in turn would have revealed the defendant's connection*") (emphasis added).

In this case, the Court of Appeals put its own gloss on the discovery rule and concluded that, *as a matter of law,* (1) a reasonable plaintiff who knows that he or she has been injured and knows the physical cause of the injury would investigate the possible existence of an additional defendant that may have caused the injury "by seeking advice in the medical and legal community"; and (2) the limitations period commences when that duty to investigate arises. *T. R.*, 205 Or App at 142-43.

There are three problems with that reasoning. First, as we have explained, the discovery rule recognizes that the existence of one type of wrongdoing does not necessarily disclose tortious conduct of a different sort, by a different tortfeasor. A plaintiff who knows that one defendant has caused him or her harm does not necessarily know that another defendant has done so in a different way. Depending on the facts of the particular case, a reasonable person who knows the identity of the tortfeasor who was the immediate physical cause of his or her injury may or may not be alerted to the possible existence of other tortfeasors.

Second, a plaintiff who is alerted to the need for further investigation only is required to conduct an investigation that a reasonable person in his or her circumstances would conduct. *See Doe v. American Red Cross,* 322 Or 502, 511-13, 910 P2d 364 (1996) (discovery is determined by objective, reasonable person standard). A plaintiff is not necessarily charged with employing experts to uncover facts that a reasonable person in plaintiff's circumstances could not uncover.

Third, the Court of Appeals decided that the statute of limitations began to run because plaintiff had a duty to investigate. *T. R.,* 205 Or App at 142-43. That is not so, however, unless an investigation would have disclosed the necessary facts. The party who asserts the statute of limitations defense must prove that an investigation would have disclosed those facts. *See Doe,* 322 Or at 514-15 (party who asserts

limitations defense must prove the facts investigation would disclose). The Court of Appeals failed to consider that aspect of the discovery rule, and erroneously concluded that the duty to investigate alone was sufficient to commence the running of the statute of limitations.

The Court of Appeals based its decision on two United States Supreme Court cases, *United States v. Kubrick,* 444 US 111, 100 S Ct 352, 62 L Ed 2d 259 (1979), and *Rotella v. Wood,* 528 US 549, 120 S Ct 1075, 145 L Ed 2d 1047 (2000). But neither *Kubrick* nor *Rotella* is a Section 1983 case, and neither bears on whether a plaintiff's knowledge of the existence of one tortfeasor charges the plaintiff with knowledge of the existence of other defendants or whether a plaintiff should be expected to hire experts to investigate the possibility that other defendants exist. In *Kubrick,* the Court described both the fact "that [the plaintiff] has been hurt" *and* "who has inflicted the injury" as "critical facts" that a plaintiff must know to start the statute of limitations running. 444 US at 122. In *Kubrick,* the plaintiff knew both critical facts. He knew that he had been harmed and that his physician had harmed him. Plaintiff argued, however, that his claim did not accrue until he also realized the legal consequences of those facts: that "the acts inflicting the injury may [have] constitute[d] medical malpractice." *Id.* at 113. In rejecting plaintiff's argument, the Supreme Court explained that a plaintiff cannot be expected to know facts that only an expert could obtain, but a plaintiff can be expected to seek

out an expert in order to learn the legal ramifications of known facts. The Court stated:

> "We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury and its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask."

Id. at 122. *Kubrick* stands for the proposition that a plaintiff who knows the facts establishing that a particular defendant played a causal role in his or her injury must seek medical and legal advice about whether those facts justify legal action – advice within the expertise of those consultants. *Kubrick* does not stand for the proposition that a plaintiff who does not know the facts indicating that a particular defendant played a causal role in his or her injury must employ the assistance of doctors or lawyers to uncover such facts.

Rotella also does not convince us that we should reach a different conclusion. As in *Kubrick*, the plaintiff in *Rotella* both knew that he had been injured and

that the named defendant had injured him by engaging in illegal action. Plaintiff argued, however, that his Racketeer Influence and Corrupt Organization (RICO) claim did not accrue until he discovered, in addition to those critical facts, that the named defendant had engaged in a pattern and practice of illegal acts. 528 US at 552-53. The Court rejected plaintiff's argument, reasoning that Congress had modeled RICO on the Clayton Act, and that adopting an accrual rule that required discovery of a defendant's pattern and practice in addition to that defendant's discrete illegal act would not comport with Clayton Act limitations or the purposes of the RICO statute. *Id.* at 557-58. *Kubrick* and *Rotella* are consistent with the discovery accrual rule as we have stated it.[5]

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[5] The city also urges that we consider, and the Court of Appeals cited and relied on, a Ninth Circuit decision, *Plumeau v. School Dist. # 40 County of Yamhill,* 130 F3d 432 (9th Cir 1997). In that case, a school janitor sexually abused a young girl, who, five years later, attempted suicide. Shortly thereafter, the girl told her mother about the abuse and she and her mother brought an action against the school district. The court affirmed summary judgment for the district. As to plaintiffs' state law claims, the court rested its ruling on the fact that plaintiffs did not give the requisite tort claim notice within the time required after the girl informed her mother of the abuse. *Id.* at 440. As to plaintiffs' Section 1983 claim, the court rested its ruling on plaintiffs' failure to adduce sufficient facts to establish district liability. *Id.* at 438-39. *Plumeau* did not decide that plaintiffs' Section 1983 action against the district was untimely. To the contrary, in *dicta,* the court stated that the opposite assumption was appropriate because plaintiffs filed their Section 1983 claim within two years from the "date of discovery." The court considered the "date of discovery" to be the date the girl manifested

(Continued on following page)

To restate, then, the discovery accrual rule provides that a plaintiff's claim against a particular defendant accrues when (1) the plaintiff knows, or a reasonable person should know, that there is enough chance that the defendant had a role in causing the plaintiff's injury to require further investigation; and (2) an investigation would have revealed the defendant's role. Application of the discovery accrual rule is a factual issue for the jury unless the only conclusion a reasonable jury could reach is that the plaintiff knew or should have known the critical facts at a specified time and did not file suit within the requisite time thereafter. *See Brown v. J.C. Penney Co.*, 297 Or 695, 705-06, 688 P2d 811 (1984) (appellate court cannot set aside trial court's denial of motion for directed verdict unless there is no evidence from which the jury could have found the necessary facts). In this case, the specific question presented is whether the only conclusion that a reasonable jury could have reached was that plaintiff's knowledge in 1996 should have alerted him to the possibility that the city played a causal role in his abuse, that a reasonable person in plaintiff's circumstances would have investigated that possible role, and that such an

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injury from the abuse, attempted suicide, and reported the abuse to a trusted adult, not the date the girl was subjected to the acts of abuse. *Id.* at 438. We do not find *Plumeau* to be inconsistent with the discovery accrual rule as we have articulated it.

investigation would have disclosed facts indicating the city's role.[6]

The city argues that, in 1996, plaintiff knew that he had been injured, that Tannehill was the immediate cause of his injury, and that Tannehill was employed by the city. The city argues that a reasonable jury would necessarily have concluded from those facts that plaintiff should have known that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury *could* have reached that conclusion, we do not agree that that was the *only* conclusion a reasonable jury could have reached. Tannehill's wrongful acts were very personal and private. Although some of those acts were committed while Tannehill was on duty, others were not, and the nature of the acts did not necessarily indicate that Tannehill committed them within the scope of his employment. More importantly, under Section 1983, the city could not be held liable for Tannehill's acts solely because it employed him. The city's liability

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[6] In addition to arguing that the trial court correctly denied the city's motion for a directed verdict because there was a question of fact as to when plaintiff reasonably should have discovered the city's role, plaintiff also argues that the trial court ruled correctly because a question of fact existed as to when he reasonably should have discovered that the acts of abuse caused him harm. Because we decide that there was a question of fact as to when plaintiff reasonably should have discovered the city's role, we do not address plaintiff's additional argument or whether plaintiff properly preserved that argument.

necessarily required proof of municipal wrongdoing – wrongdoing of a different kind than Tannehill's. A reasonable jury could have found that, at the time of the abuse, plaintiff did not suspect the city itself of causing him harm, and that plaintiff's state of mind at that time was a reasonable one.

Two particular aspects of this case support our conclusion. First, plaintiff was a minor when Tannehill committed the acts of abuse. In reviewing the facts presented to the jury, we look at them, as the jury was required to do, from the perspective of a reasonable person under the relevant circumstances, which include plaintiff's minority.[7] *See* W. Page Keeton, *Prosser and Keeton on Torts* § 32, 179-80 (5th ed 1984) (in determining whether actions of child tortfeasor are reasonable, view actions from the

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[7] The Court of Appeals noted that although plaintiff was a minor when Tannehill committed the acts of abuse, he was no longer a minor when he turned 18 and was permitted time to bring his claim thereafter. *See* ORS 12.160 (1995) (tolling statute during minority, but for no more than five years total or one year after the plaintiff reaches the age of majority, whichever first occurs). The Court of Appeals therefore granted no significance to the fact that plaintiff was a minor when he was subjected to the abuse. *T. R.*, 205 Or App at 143 n 4. In our view, because the city argues that plaintiff's claim accrued when Tannehill committed the abuse and plaintiff was a minor at that time, we cannot disregard the fact of plaintiff's minority. The discovery rule requires a determination of what a reasonable person would have known at the time of asserted accrual.

perspective of a reasonable child).[8] As this court explained in *Doe*:

> "The test involved in such circumstances is an objective one: 'In most cases, the inquiry will concern what a plaintiff should have known in the exercise of reasonable care. In such cases, the relevant inquiry is how a reasonable person of ordinary prudence would have acted in the same or similar situation.'"

322 Or at 512 (quoting *Gaston v. Parsons*, 318 Or 247, 256, 864 P2d 1319 (1994)). A reasonable jury could have found that a teenager subjected to sexual abuse by a police officer reasonably may have believed that that officer's acts were the acts of a man who was acting on his own, based upon his own sexual proclivities, and reasonably may not have suspected that higher city officials could have been to blame for his predicament.

Second, when plaintiff ventured to question two city officers about Tannehill's drinking with him and whether Tannehill had an interest in boys, one exhibited acceptance of the misconduct and the other discouraged any further inquiry. The reactions of those adults did not put plaintiff on notice that what Tannehill or the city was doing, or failing to do, might merit investigation. *See Gaston*, 318 Or at 257

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[8] The "reasonable person" standard is generally discussed in terms of the actions a reasonable defendant would have taken, but it is equally applicable where there is a contention that a plaintiff did not act reasonably.

(assurances by persons in positions of trust and confidence that action is not tortious may be considered in determining whether reasonable person would have engaged in further investigation). Tannehill coerced and intimidated plaintiff and was in a position of authority in the department. A reasonable jury could have found that the responses that plaintiff received when he attempted to question other officers about Tannehill's behavior served to reinforce plaintiff's reasonable belief that further inquiry would not be productive.

In summary, we hold that, based on the evidence in this record, a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused him harm.

Alternatively, and even if a reasonable person would have made inquiry as to the city's role in 1996, we cannot conclude, as a matter of law, that an inquiry would have revealed facts indicating that a city policy may have caused plaintiff harm. *See Doe,* 322 Or at 514 (accrual depends on what facts party with duty to investigate would have been able to learn); *see also Kubrick,* 444 US at 122 (acknowledging that a plaintiff may not be able to sue when the facts are "in control of the putative defendant"). The statute of limitations is an affirmative defense, and the city had the burden of persuasion on that issue. ORCP 21 G(2) (statute of limitations is affirmative defense); *Keller v. Armstrong World Industries, Inc.,* 342 Or 23, 38

n 12, 147 P3d 1154 (2006) (citing *Nelson v. Hughes*, 290 Or 653, 664-65, 625 P2d 643 (1981)). The city has not argued and has not pointed to evidence that, had plaintiff inquired, its officials would have disclosed that they knew that they should have had policies and procedures in place to protect plaintiff but did not, or that, although they knew that their officers were engaging in misconduct that could lead to sexual abuse, they permitted the misconduct to continue. To the contrary, the record discloses evidence that when plaintiff did make a limited inquiry into Tannehill's behavior, his inquiries were rebuffed. As one witness put it, the city styled its management after an ostrich with its head in the sand, not wanting to know about, admit, or correct any wrongdoing. A former sheriff's deputy testified, for instance, that, in approximately 1992, he reported concerns about a party where city officers furnished alcohol to minors and about one officer in particular who was rumored to be having what was referred to as "an affair" with a teenage Explorer. That officer said he was "just having fun" with the teenager, and the city did nothing in response to that report other than warn the officer that he should be very careful with the relationship. The fraternization and the "affair" continued, and there was evidence that when that "affair" was revealed, the police department actively hindered its investigation and prosecution. In addition, a former Explorer testified that, in approximately 1998, when he told the city manager about finding several of his friends "falling down drunk" at the home and in the presence of the officer who was arrested in 2001

for serving alcohol to minors, the city manager replied that he "did not want to hear that," and, to the knowledge of that witness, failed to follow up with any investigation. Whether the city would have divulged facts indicating its responsibility for plaintiff's injuries if he had inquired was certainly a jury question.

The city's final argument is that plaintiff did not learn facts in October 2001 that he did not know at the time of Tannehill's abuse and, therefore, plaintiff must have known all the facts necessary for his claim to accrue at the time of the abuse. As the city portrays it, the only fact plaintiff learned in 2001 was that others knew that Tannehill was gay, a fact plaintiff had known all along. But that portrayal does not accurately capture the facts presented to the jury. The jury heard evidence that it was in October 2001 that plaintiff learned that an officer other than Tannehill had engaged in similar misconduct, *i.e.*, that Tannehill's misconduct might not be that of a lone officer, but could be more widespread. It was then that plaintiff was questioned by state police officers who demonstrated that Tannehill's behavior was cause for governmental concern, and it was during the grand jury proceedings that followed that plaintiff learned that the city may have known about widespread misconduct in the Explorer program and failed to protect him from being abused. Perhaps the jury could have drawn the inference from the evidence that the city urges, but we cannot say that it was required to do so.

Because there were facts from which a reasonable jury could have found, as the jury did in this case, that plaintiff's Section 1983 claim against the city did not accrue at the time Tannehill committed the acts of sexual abuse, the trial court did not err in denying defendant's motion for a directed verdict on statute of limitations grounds.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings.

FILED: April 19, 2006

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

T. R.,

Respondent – Cross-Appellant,

v.

THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL,

Defendants,

and

CITY OF THE DALLES,
a political subdivision of the State of Oregon,

Appellant-Cross-Respondent.

0206-05750; A125742

Appeal from Circuit Court, Multnomah County.

Alicia Fuchs, Judge.

Argued and submitted November 22, 2005.

Robert E. Franz, Jr., argued the cause for appellant – cross-respondent. On the briefs were Jason M. Montgomery, and Law Office of Robert E. Franz, Jr.

Jonathan A. Clark argued the cause for respondent – cross-appellant. With him on the briefs were Kelly Clark and O'Donnell & Clark LLP.

Before Landau, Presiding Judge, and Schuman, Judge, and Deits, Judge pro tempore.

SCHUMAN, J.

Judgment reversed on appeal; supplemental judgment vacated; cross-appeal dismissed as moot.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellant on appeal; cross-respondent on cross-appeal

[ ] No costs allowed.
[x] Costs allowed, payable by: Respondent on appeal; cross-appellant on cross-appeal
[ ] Costs allowed, to abide the outcome on remand, payable by:

SCHUMAN, J.

The City of The Dalles appeals from a judgment awarding plaintiff $81,260.00 in damages on a claim under the federal civil rights law, 42 USC section 1983, and from a supplemental judgment awarding plaintiff $261,701.92 in costs and attorney fees. The claim was based on allegations that the city was responsible for an employee's sexual abuse of plaintiff. The city assigns error to, among other things, the trial court's denial of its motion for a directed verdict, contending that, as a matter of law, plaintiff did not file his claim within two years of its accrual and therefore did not meet the applicable statute of limitations. Because we agree with that threshold argument, we reverse the judgment against the city and vacate the supplemental judgment, without reaching the city's other arguments or plaintiff's cross-appeal.[1]

In reviewing the denial of a motion for a directed verdict, we view the facts and all reasonable inferences drawn from them in the light most favorable to

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[1] On the merits, the city contends that the trial court should have granted its motion to dismiss and its motion for a directed verdict with respect to plaintiff's claims that the city failed to train its officers and that the city had a custom or practice of deliberate indifference to his rights. Plaintiff cross-appeals from a ruling sustaining defendant's hearsay objection to certain evidence regarding the extent of the city's notice of its employees' actions and from a ruling that limited plaintiff's prayer for economic damages by characterizing lost earning capacity as noneconomic damages.

the nonmoving party—here, plaintiff. *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 411, 69 P3d 710 (2003). Under that standard, the relevant facts are as follows.

The city, in cooperation with the Boy Scouts of America, operated an Explorer program designed to introduce young adults to police work. Plaintiff joined the program in 1995, when he was sixteen, at the urging of the program's advisor, Officer Tannehill of The Dalles police department. In the ensuing months, plaintiff and Tannehill began spending time together. They saw each other while Tannehill was both on and off duty, including on occasions that were not part of the Explorer program. Plaintiff began to visit Tannehill at his home, and Tannehill began regularly providing plaintiff with alcohol. He also began to make inappropriate comments about plaintiff's physical qualities. Ultimately, between January and March 1996, Tannehill and plaintiff engaged in sexual activity on numerous occasions, usually without plaintiff's consent and sometimes under compulsion by Tannehill. Plaintiff inquired of two other officers employed by the city, Officers Kirk and Nelson, regarding Tannehill's sexual orientation, but, beyond those limited inquiries, plaintiff did not report Tannehill's abuse because, in plaintiff's words, he was "scared more than anything."

Five years later, in October 2001, plaintiff became aware that Kirk was under investigation for serving alcohol to a minor. Plaintiff contacted the state police to provide information regarding Kirk,

and, during his interviews, he also provided information about Tannehill, apparently including information about being sexually abused himself. Shortly thereafter, in October or November 2001, plaintiff was called to testify at a grand jury proceeding regarding the allegations against Tannehill. Plaintiff was not permitted to listen to the testimony of other witnesses, nor was he able to talk about the substance of the proceeding with other people there. However, his observation of the other officers who were called to testify suggested to him that "[e]verybody knew" that "Jim [Tannehill] likes boys, Jim's a queer * * *."

Plaintiff filed his initial complaint in June 2002. It included a common law negligence claim against the city and a section 1983 claim against Tannehill.[2] The section 1983 claim against the city first appeared in plaintiff's first amended complaint, filed in July 2003; that claim was later amended in April 2004, alleging that, by ignoring reports of Tannehill's abusive tendencies and by failing properly to train its officers, the city deprived plaintiff of his civil rights. The city moved for summary judgment, arguing that the section 1983 claim against it was barred by the statute of limitations. The court denied the motion. Subsequently, at the close of the evidence, the city moved for a directed verdict, renewing its statute of

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[2] Shortly before trial, the section 1983 claim against Tannehill was dismissed on the ground that it was time barred. Plaintiff does not appeal that ruling.

limitations defense. The court again denied the motion on the ground that a fact question existed as to whether plaintiff timely filed his claim. Ultimately, the jury returned a verdict in favor of plaintiff.

On appeal, the city assigns error to the court's denial of its motion for a directed verdict on the issue of the statute of limitations and to its rulings on a number of substantive issues; plaintiff, in turn, cross-appeals from an evidentiary ruling and a ruling that limited the measure of damages. *See* ___ Or App at ___ n 1 (slip op at 1 n 1). As noted, we conclude that plaintiff's action was barred by the statute of limitations, and we therefore do not reach the city's other assignments of error or plaintiff's cross-appeal.

Because section 1983 does not contain a statute of limitations, we apply the state's statute of limitations for personal injury claims. 42 USC § 1988(a) (gaps in federal civil rights acts should be filled by state law); *Wilson v. Garcia,* 471 US 261, 276, 105 S Ct 1938, 85 L Ed 2d 254 (1985) (specifying that federal courts borrow state personal injury statutes of limitations); *Plumeau v. School District #40 County of Yamhill,* 130 F3d 432, 438 (9th Cir 1997) (same). Oregon's statute of limitations for torts is two years.[3] ORS 12.110(1). In order to determine the date upon

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[3] The parties agree that this case had to be filed within two years of accrual. Neither party argues that the timing provisions of ORS 12.117, dealing with actions based on child abuse, apply, and we do not decide that issue.

which the statute of limitations begins to run, that is, the date that a plaintiff's claim accrues, federal interpretations of accrual are controlling. *Johnson v. State of California,* 207 F3d 650, 653 (9th Cir 2000). Under federal law, a claim accrues, not when the injury actually occurs, but "when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Id.*

According to the city, plaintiff's claim accrued (and the statute of limitations therefore began to run) in March 1996, when plaintiff knew that he was injured and he knew the injury resulted from being sexually abused by Tannehill while Tannehill was on duty as a city employee. Plaintiff contends that his claim did not accrue until he also knew that the city, at least potentially, caused his injury, and that he did not acquire that knowledge until the grand jury proceeding in October or November 2001. Because plaintiff began his action against the city in June 2002, his claim was timely under his theory and barred under the city's.

Although the United States Supreme Court has not addressed the issue of accrual dates in the specific context of section 1983 claims, it has addressed the general issues of tort claim accrual and discovery on at least two occasions. In *United States v. Kubrick,* 444 US 111, 113-14, 100 S Ct 352, 62 L Ed 2d 259 (1979), the plaintiff was treated at a hospital with an antibiotic and later experienced a hearing loss which he attributed to that treatment. To avoid a statute of limitations defense, the plaintiff argued that his

claim against the hospital did not accrue until he learned of "the existence and the cause of his injury" and also "that the acts inflicting the injury may constitute medical malpractice." *Id.* at 113. The district court and court of appeals agreed with the plaintiff, but the Supreme Court reversed, describing the negative policy implications inherent in the plaintiff's position: "[T]he plaintiff in such cases [would not need to] initiate a prompt inquiry and would be free to sue at any time within two years from the time he receives or perhaps forms for himself a reasonable opinion that he has been wronged." *Id.* at 118. The Court adopted a rule under which the limitations period begins when a plaintiff knows that he or she has been injured and knows or should know the cause of the injury; at that point, a plaintiff

> "can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government."

Id. at 123. Commenting on *Kubrick* in a later case, *Rotella v. Wood,* 528 US 549, 555, 120 S Ct 1075, 145 L Ed 2d 1047 (2000), the Court held that the "traditional federal accrual rule" is the "injury discovery" rule, under which "discovery of the injury, not discovery of the *other elements of a claim,* is what starts the clock." (Emphasis added.)

What the Court in *Kubrick* and *Rotella* did not clearly state is whether a plaintiff who knows the fact of the injury and its physical cause, but does not know who is *actually* responsible for its infliction, has sufficient knowledge to trigger the obligation of further inquiry so as to begin the limitations period. However, the identity of the tortfeasor is obviously an element of the claim, and it is clear that *Kubrick* and *Rotella* hold that the period begins when a plaintiff has information that would cause a reasonable person to seek the medical or legal advice that would inform him or her that he or she has a potential claim. The implication of the Supreme Court cases, then, is that the claim can accrue before the plaintiff actually knows the identity of the tortfeasor if he or she has sufficient information to cause a reasonable person to make a further inquiry – and that a plaintiff who knows he or she is injured and knows the physical or immediate cause of the injury has such information.

Subsequent federal cases confirm the accuracy of that implication. *E.g., Plumeau,* 130 F3d at 437 ("A plaintiff has a duty to use due diligence in an effort to discover the party responsible for her injury."); *Gould v. U.S. Dept. of Health & Human Services,* 905 F2d 738, 745 (4th Cir 1990), *cert den,* 498 US 1025 (1991) (statute of limitations "does not wait until a plaintiff is aware that an alleged tortfeasor is a federal employee"); *Gibson v. United States,* 781 F2d 1334, 1344 (9th Cir 1986), *cert den,* 479 US 1054 (1987) (accrual occurs when the plaintiff has knowledge of "both the fact of injury and its immediate physical cause";

ignorance as to the involvement of government employees is irrelevant); *Dyniewicz v. United States,* 742 F2d 484, 486 (9th Cir 1984) (once the plaintiff is aware of injury and physical cause, claim accrues regardless of whether identity of tortfeasor is known); *Davis v. United States,* 642 F2d 328, 331 (9th Cir 1981), *cert den,* 455 US 919 (1982) ("In the absence of fraudulent concealment it is plaintiff's burden, within the statutory period, to determine whether and whom to sue."); *Clavette v. Sweeney,* 132 F Supp 2d 864, 874 (D Or 2001) (plaintiff's section 1983 claim was time barred; under *Kubrick,* "the statute of limitations begins to run as soon as the plaintiff knows he or she has been injured and knows the physical cause of that injury").

Plumeau is particularly instructive. In that case, the plaintiff was the mother of a grade-school child who was sexually abused on school property by a school employee, the janitor, between 1984 and 1987. 130 F3d at 434-35. The plaintiff did not discover the abuse until 1992, when the child attempted suicide and, in the aftermath, disclosed what had happened. *Id.* at 435. The janitor was convicted of the abuse, and, at a sentencing hearing on September 9, 1993, the plaintiff (according to her testimony) first began to suspect that the school district, as employer of the janitor, was in some measure responsible for the injury. *Id.* She filed a state tort claim and a section 1983 claim against the district in federal court on May 10, 1994. *Id.* The district moved for summary judgment, arguing, among other things, that the

plaintiff did not provide the district with notice of her state tort claim within the 270 days allowed by ORS 30.275. *Id.* at 437.

The court held, first, that the 270-day limitation period began not at the sentencing hearing where the plaintiff first learned that the district might be potentially responsible for the abuse, but "long before" that time; the plaintiff had

> "a duty to use due diligence in an effort to discover the party responsible for her injury. * * * The Plumeaus knew the abuse took place during school hours and on school property and that the abuser was a school district employee. We agree with the district court that these facts were sufficient to apprise the Plumeaus of their potential claims against the district for failure to supervise [the employee]."

Id. The court also held that the same events triggered the statute of limitations for the section 1983 claim: "[T]he date of discovery was May 29, 1992, shortly following [the child's] suicide attempt." *Id.* at 438. Thus, according to the court, the plaintiff's claim against the government employer accrued as soon as she had knowledge of the sexual abuse and of circumstances clearly indicating the relationship between the abuser and his government employer.

In the present case, undisputed facts allow only one conclusion: More than two years before he filed this action, plaintiff knew sufficient facts to trigger the duty to discover the parties that caused his

injury.[4] He knew that he was injured; he knew that sexual abuse inflicted by Tannehill was the physical cause of his injury; he knew that at least some of the abuse occurred while Tannehill was on duty; and he knew that Tannehill was a city employee. A reasonable person would have acted on those facts by "seeking advice in the medical and legal community." *Kubrick,* 444 US at 123.

Further, plaintiff's argument that he obtained sufficient facts to trigger his duty of inquiry only at the grand jury proceeding is not plausible. By plaintiff's own admission, the information that he obtained there amounted only to an awareness that "everybody knew" that Tannehill was gay – a fact that does not give rise to knowledge of any kind of new injury, nor a fresh perspective on an injury already incurred. In sum, at the time of the abuse itself, plaintiff had sufficient information regarding his injury and its physical cause to trigger a reasonably diligent inquiry into whether he had legal recourse and, if so, whether it ran against the city. At that point, his action against the city accrued. He did not file his claim within the statute of limitations. The trial court should have granted the city's motion to dismiss.

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[4] We need not discuss the effect of plaintiff's minority on the statute of limitations because more than two years passed between his eighteenth birthday and the commencement of this action. ORS 12.160.

Judgment reversed on appeal; supplemental judgment vacated; cross-appeal dismissed as moot.

IN THE CIRCUIT COURT OF
THE STATE OF OREGON FOR
THE COUNTY OF MULTNOMAH

T.R., Plaintiff, v. **The Boy Scouts of America**, a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America**, an Oregon non-profit corporation; the **City of The Dalles, Oregon**, a political subdivision of the State of Oregon; and **James Donald Tannehill**, Defendants.	Case No. 020605750 Supplemental Memorandum of Law in Response to Plaintiff's Reply on Plaintiff's Cross-Motion for Summary Judgment

COMES NOW Defendant City of The Dalles, by and through its attorneys, the Law Office of Robert E. Franz, Jr., and hereby submits the following supplemental memorandum of law in response to the new arguments raised by the plaintiff in his reply on his cross-motion for summary judgment.

I. INTRODUCTION

Plaintiff has filed a "reply" memorandum in which plaintiff raises a number of issues not previously addressed in plaintiff's response memorandum.

The arguments – which included a constitutional attack on the Oregon Tort Claims Act – require a response in writing.

* * *

a crime will be committed or to act upon that belief"), *citing, Baxendale v. Bennett,* Law Rep. 3 Q.B. 525.

Schumann explained why, at common law, a person could not be liable for the criminal act of a third party, even if that person acted negligently:

> "The reason why the principle, that where one of two innocent persons must suffer for the wrongful act of another that person should suffer whose negligence has enabled such third person to do the wrong, has no application to a case where the wrong is accomplished through the instrumentality of a criminal act is that it is the crime and not the negligent act which is the proximate and effective cause of the injury. *All the cases which we can find* hold that that principle is not applicable to cases where the loss was occasioned through the instrumentality of a criminal act, and base their reason for so holding upon the fact that it is the crime, and not the act of the innocent party, which is the proximate and effective cause of the loss. *Walsh v. Hunt,* 120 Cal. 46, 52 P. 115, 39 L. R. A. 697; *Nash v. Moore,* 165 App. Div. 67, 151 N. Y. S. 96; *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 28 N. E. 142, 13 L. R. A. 193, and note, 26 Am. St. Rep. 230; *Knoxville Nat. Bank v. Clark,* 51 Iowa, 264, 1 N. W. 491, 33

> Am. St. Rep. 129; *Burrows v. Klunk,* 70 Md. 451, 17 A. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371; *Holmes v. Trumper,* 22 Mich. 427, 7 Am. Rep. 661; *Worrall v. Gheen,* 39 Pa. 388; *Merchants of the Staple v. Bank of England,* 21 Q. B. D. 160; *Scholfield v. Londesborough,* Law Rep. (1896) A. C. 514." *Id.* (Emphasis added).

As demonstrated above, the *Schumann* Court in 1925 could find no cases holding that a party could be liable for the criminal act of a third party. *Schumann* furthermore relied upon a long list of common law cases in support of its holding. It is clear that the common law rule would have barred an action such as that initiated by the plaintiff in this case. The City simply could not have been liable at common law for the alleged criminal actions of Defendant Tannehill.

C. The Discovery Rule does not Save Plaintiff's Untimely 42 U.S.C. § 1983 Action.

Plaintiff contends that:

> "Plaintiff's Section 1983 claim against the City began to run when he realized that a custom or practice of the City was a causal factor in his abuse. Plaintiff first realized that there might be some type of City practice involved in his abuse when he heard Grand Jury testimony from police officers in Tannehill's indictment proceedings in or about October of 2001." (Plaintiff's Reply p. 6).

Specifically, plaintiff contends that,

> "[A]t the time of his molestation, [plaintiff] had no way of knowing the City of the Dalles' employees knew that Tannehill was crossing boundaries by spending time alone with T.R. and serving him alcohol, let alone knowing that the City had a policy of ignoring reports of questionable behavior on Tannehill's part while in the company of Explorer Scouts." (Plaintiff's Reply p. 7).

For this reason, plaintiff contends that his § 1983 claim did not accrue until October, 2001, because he was not aware, until then, that the City allegedly knew that Tannehill was engaged in misconduct with the plaintiff and other explorer scouts. This argument fails as a matter of law, because: 1) plaintiff failed to plead that theory; and 2) – as is discussed below – plaintiff's knowledge of the alleged sexual abuse by Tannehill, and Tannehill's status as an employee of the City, was sufficient to apprise the plaintiff of his potential claim against the City.

It is well-settled that, "[t]o avoid the bar of a limitation, plaintiffs 'must plead *facts* sufficient to show that the delay is excused.'" *Beals v. Breeden Bros., Inc.,* 113 Or. App. 566, 833 P.2d 348 (1992), *citing, Eldridge v. Eastmoreland Gen. Hospital*, 88 Or. App. 547, 550, 746 P.2d 735 (1987) (analyzing sufficiency of complaint where discovery rule asserted). Plaintiff has not pled any facts to support their discovery rule theory in this case. The complaint is plainly devoid of any facts that plaintiff was not

aware of his claims against the City until October, 2001. As a result, plaintiff's discovery rule argument must be ignored. Moreover, as is discussed below, plaintiff's argument fails on its merits.

Under federal law, accrual of a cause of action generally occurs when the plaintiff knows or has reason to know of the injury which is the basis of his action. *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1058 (9th Cir. 2002). This inquiry focuses on the harm incurred, rather than the plaintiff's knowledge of the underlying facts giving rise to the harm. *Ruff v. Runyon,* 258 F.3d 498, 501 (6th Cir. 2001). A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence. *Id.* Further, the plaintiff has reason to know of his injury when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action. *Brooks v. City of Winston-Salem,* 85 F.3d 178 (4th Cir. 1996).

Plaintiff resigned as an explorer scout on December 29, 1996. Attached hereto as Exhibit A is a true and correct copy of the Resignation Letter of Plaintiff. Attached hereto as Exhibit B is a true and correct copy of excerpts of the Deposition Transcript of Tim Roth, see pp. 372-73. There is no dispute that plaintiff was aware that Defendant Tannehill was a cause of his injury at the time he was an explorer scout. This is confirmed by plaintiff's deposition testimony in which he acknowledged that he knew that Tannehill's conduct constituted "sexual abuse" and that it

was a crime *at the time that it occurred.* (Exhibit B pp. 200-01). Plaintiff was clearly aware of his injury, and the fact that Tannehill was employed by the City, in and before 1996.

Plaintiff is left with the contention that he did not discover the basis for his *Monell* claim against the City until a later date. This approach has already been rejected by the Ninth Circuit in a child sex abuse case cited by the plaintiff, *Plumeau v. School Dist. #40 County of Yamhill,* 130 F.3d 432 (9th Cir. 1997). Contrary to plaintiff's assertion, *Plumeau* is actually adverse to plaintiff's argument in this case, not supportive. In order to understand why *Plumeau* is adverse to the plaintiff, it is important to understand the factual background of that case.

In *Plumeau,* a student, Amanda, was sexually abused by a school janitor between 1983 and 1987, when Amanda was 6-9 years of age. In 1992 – five years after the most recent abuse – Amanda attempted to commit suicide, and was hospitalized. Amanda would have been fourteen years old at the time. While in the hospital, Amanda disclosed for the first time that she had been sexually abused by the janitor. Criminal charges were brought against the janitor. While Amanda was still a minor, Amanda and her mother filed an action in federal court against the School District and the janitor, alleging state law tort claims and a claim under 42 U.S.C. § 1983. The trial court granted a motion for summary judgment in favor of the school district, and the plaintiffs appealed.

One issue in the case was the timeliness of the tort claim notice provided by the plaintiffs. The plaintiffs argued, among other things, that they did not discover their claims against the School District until they learned information at the janitor's sentencing hearing in 1993, which suggested that the school's principal was negligent. Thus, the plaintiffs argued that they filed their tort claim notice within 270-day period applicable to their claims, and that their tort claim notice was therefore timely. The Court of Appeals rejected this argument:

> "The Plumeaus' second cause of action alleges that the School District is directly liable for its own negligence in failing properly to supervise and train Moore and in failing to prevent Moore from sexually abusing Amanda. The Plumeaus argue that because they only discovered that the School District may possibly have been responsible for Moore's actions at the sentencing hearing on September 9, 1993, the May 11, 1994 letter fell within the requisite 270 days after they discovered the alleged injury. The School District argues, and the magistrate agreed, that the Plumeaus should have known that the School District was potentially liable for Amanda's abuse long before the Victim's Assistance Worker relayed to them her theory of the case.
>
> A plaintiff has a duty to use due diligence in an effort to discover the party responsible for her injury. *Georgeson v. State of Oregon,* 75 Or. App. 213, 706 P.2d 570, 571 (1985). The

> Plumeaus knew the abuse took place during school hours and on school property and that the abuser was a school district employee. We agree with the district court that these facts were sufficient to apprise the Plumeaus of their potential claims against the district for failure to supervise Moore." *Id.* at 346.

Plumeau is persuasive in this case. The contention in *Plumeau* was essentially the same as that asserted by the plaintiff in this case. Plaintiff alleged that the facts giving rise to the claim against the public body did not come about until a sentencing hearing. Here, plaintiff alleges that the facts did not come about until a grand jury proceeding, which occurred more than five years after plaintiff's injury. In both cases, the plaintiffs alleged that the failure to discover the basis for particular allegations against the public body extended the statutory period under the discovery rule. *Plumeau* expressly rejected this approach, holding that knowledge of the underlying abuse, and of the tortfeasor's status as an employee of the public body, were sufficient to apprise the plaintiffs of their claim against the public body. Similarly, plaintiff's knowledge of Tannehill's involvement in his injury, and of his status as an employee of the City sufficiently apprised plaintiff of his claim against the City. He cannot avoid the statute of limitations on a discovery rule theory.

Plumeau did, as plaintiff notes, hold that the plaintiffs' § 1983 action was filed within the two-year statute of limitations, even though they had failed to

provide timely tort claim notice on their state law claims. However, there is a critical difference between this case and *Plumeau*. In 1992, when Amanda disclosed her sexual abuse for the first time, she was only 14 years old. Thus, the "discovery" was made by adults, not by Amanda herself. The injury to Amanda truly was not discovered until less than two years before the filing of the complaint in 1994. Plaintiff, on the other hand, reached the age of 18 in 1997, more than four years before the grand jury proceedings and his alleged discovery. As such, plaintiff was an adult, and did not need another adult to discover his injury for him. *Plumeau* clearly holds that plaintiff cannot use his claim against the City as a reason for extending the statute of limitations five years, where plaintiff knew that the City was Tannehill's employer in 1996. As an adult, plaintiff was capable of conducting an investigation and pursuing his potential claims against the City long before the grand jury proceeding in 2001.

Plaintiff's argument is especially attenuated in this case, because plaintiff asks this Court to essentially grant the plaintiff an extra five years to think over the possible claims that existed outside of his claim against Tannehill. During that five-year span, plaintiff left the explorers, joined the army, returned home, and reached the age of majority, all with four years of adulthood to pursue his claims. (Amended Complaint ¶ 1; Exhibit B pp. 24, 91). It would be fallacious to find that a plaintiff under these circumstances can claim that they did not know of their

possible claims against the City. Applying the discovery rule in this case would place a heavy burden on the City. The City promptly disciplined and investigated its officers when their conduct was revealed. (Exhibit C; Affidavit of Jay Waterbury). Nevertheless, plaintiffs position would have the City waiting for most of a decade for the possibility of a lawsuit; whenever the plaintiff felt the need to begin investigating his claims. Nothing precluded plaintiff, as an adult, from hiring an attorney, or otherwise investigating a possible claim against the City far prior to October, 2001. The City should not be punished for plaintiff's inaction. This is simply not a case for application of the discovery rule.

D. Plaintiff's § 1983 Action Fails on its Merits.

Plaintiff's Fourth Claim for Relief alleges in pertinent part:

> "While Plaintiff was under his care, Defendant Tannehill acted with deliberate indifference to the known and recognized constitutional and legal rights of Plaintiff; Tannehill actively participated in the deprivation of Plaintiff's constitutional rights by actually molesting Plaintiff.
>
> * * *
>
> The conduct of Defendant Tannehill, within his active duties as a police officer and under color of state law, deprived Plaintiff of rights, privileges and immunities secured by the

> United States Constitution. Particularly, Plaintiff was deprived of his constitutional liberty interest to be free from sexual abuse and the threat of such abuse perpetrated by police officer [sic] who was acting as a guide and mentor while on duty.
>
> * * *
>
> At all relevant times, Defendant The Dalles had a policy or practice of ignoring reports of misconduct by its officers regarding inappropriate activities between Tannehill and certain Explorer scouts, including ignoring actual knowledge of Tannehill providing Explorer scouts alcohol, and spending inappropriate amounts of time alone with a number of Explorer scouts." (Amended Complaint ¶¶ 23-25).

Stated succinctly, plaintiff alleges that Tannehill acted under the color of law, and that he violated plaintiff's constitutional rights by molesting the plaintiff. Plaintiff alleges that the City violated plaintiff's constitutional rights by disregarding reports of misconduct between Tannehill and explorer scouts. This claim fails as a matter of law for the reasons discussed below.

* * *

L.Ed.2d 249 (1989). The City cannot be liable under the Fourteenth Amendment for the private conduct of Defendant Tannehill under the rule of *DeShaney*.

Finally, it is undisputed that the City never took any actions to affirmatively place the plaintiff in a

place of danger. (Exhibit C). Further, there was no special relationship between the Police Department, or any member of the Police Department, and the plaintiff. Thus, plaintiff cannot show a violation of the Fourteenth Amendment, and summary judgment is appropriate on the Fourth Claim for Relief.

III. CONCLUSION

For the foregoing reasons, summary judgment should be granted against the plaintiff on all of his claims against Defendant City of The Dalles.

DATED: Thursday, October 16, 2003.

Respectfully submitted,

By: /s/ Robert E. Franz, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SUPPLEMENTAL MEMORANDUM OF LAW IN RESPONSE TO PLAINTIFF'S REPLY TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT on Plaintiff and Codefendants by depositing a certified true copy thereof in the United States mail in Springfield, Oregon, on Thursday, October 16, 2003, enclosed in a sealed envelope, with postage paid and addressed to:

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DATED: Thursday, October 16, 2003.

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I hereby certify that this document is a true and correct copy of the original.

Robert E. Franz, Jr.

IN THE CIRCUIT COURT OF
THE STATE OF OREGON FOR
THE COUNTY OF MULTNOMAH

T.R., Plaintiff, v. **The Boy Scouts of America**, a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America**, an Oregon non-profit corporation; the **City of The Dalles, Oregon**, a political subdivision of the State of Oregon; and **James Donald Tannehill**, Defendants.	Case No. 020605750 Trial Memorandum of Defendant City of The Dalles

COMES NOW Defendant City of The Dalles, by and through its attorneys, the Law Office of Robert E. Franz, Jr., and hereby submits the following Trial Memorandum.

* * *

II. Plaintiff's Claims Against the City of The Dalles is barred by the two-year statute of limitations.

On June 11, 2002, the Plaintiff filed his initial Complaint. In that Complaint, the plaintiff only

alleged a common law negligence claim against the City. On July 7, 2003, the Plaintiff filed an Amended Complaint. In that Complaint, the plaintiff added a new cause of action against the City. The new cause of action was a Section 1983 claim against the City, in which the plaintiff contended that the City had a policy or practice of ignoring signs and reports of misconduct by its officers.

The City filed a motion for summary judgment against the Amended Complaint, on the grounds that the Plaintiff's claims were barred by the statute of limitations. The Court found that the common law negligence claim was barred by the two-year statute of limitations of the Oregon Tort Claims Act (ORS 30.275). The Court also found that the two-year statute of limitations of the Oregon Tort Claims Act did not apply to Plaintiff's Section 1983 claim.

Prior to the motion for summary judgment hearing, the plaintiff contended that both his negligent claim and his Section 1983 claim were governed by a six-year statute of limitations. The defendant City contended it was a two-year statute of limitations.

At the hearing, the Plaintiff conceded that his Section 1983 claim was governed by a two-year statute of limitations. However, the plaintiff contended that the two-year statute of limitations was ORS 12.110, and not the two-year statute of limitations set forth in the Oregon Tort Claims Act, ORS 30.275. The plaintiff also requested additional time to

take the deposition of Tannehill before being required to address the issues raised by ORS 12.110.

The Court then denied the City's motion for summary judgment on Plaintiff's Section 1983 claim, with the understanding that the City could then later raise ORS 12.110 as a defense after Tannehill's deposition was taken by the Plaintiff. By the time Tannehill's deposition was taken, March 8, 2004, it was too late for the City to file its motion for summary judgment, since the motion could not be filed more than 60 days prior to trial.

Then, on March 19, 2004, over the objections of the City, the Court allowed the plaintiff to file his Second Amended Complaint. That complaint added a new cause of action based upon Section 1983; namely, a claim that the City failed to adequately train its officers.

As indicated above, at the motion for summary judgment hearing, the Plaintiff argued initially that the statute of limitations applicable to his § 1983 claim was ORS 12.117, which provides for a six-year statute of limitations for cases relating to child abuse. In response, the City cited *Blake v. Dickason*, 997 F.2d 749, 750-51 (10th Cir. 1993), which analyzed United States Supreme Court precedent and held that Colorado's six-year statute of limitations for actions based on sexual assaults against a child did not apply to a § 1983 action, and that the two-year general personal injury statute applied.

At oral argument, the plaintiff conceded that *Blake* was controlling:

> "The Court: What about this Tenth Circuit case? What do – what do we do about that? I mean, should I just ignore it?
>
> Mr. Clark: The Blake case?
>
> The Court: Yeah.
>
> Mr. Clark: I think you – I think you follow it. For purposes of today, I think you follow it. * * * " (Exhibit A, Transcript of Hearing of April 13th, 2004.)"

Since plaintiff has conceded that the *Blake* case should be followed, there is no dispute that the Oregon general residuary personal injury statute of limitations applies to the plaintiff's claim, and that the statute of limitations is therefore two years. ORS 12.110(1).

Plaintiff resigned as an explorer scout on December 29, 1996. (Exhibit 101A, Resignation Letter.) Plaintiff had until December 29, 1998, to file his § 1983 claim against the City.

Plaintiff did not file his negligence claim against the City until June 11, 2002, more than five years after the plaintiffs alleged common law tort injury. Plaintiff did not file his first Section 1983 claim against the City until July 7, 2003, more than six years after the plaintiff's alleged constitutional injury. Plaintiff did not file his second Section 1983 claim against the City until March 19, 2004, more

than seven years after the plaintiff's alleged constitutional injury. Thus, as to the plaintiff's § 1983 claims against the City, such claims are barred by the statute of limitations, regardless of whether this Court applies the correct two year statute of limitations, or the incorrect six year statute of limitation.

III. The City Cannot be Liable Because No Underlying Constitutional Violation Occurred.

In order to demonstrate the existence of a constitutional violation under § 1983, plaintiff must prove that Defendant Tannehill acted under the color of state law. *Roe v. Humke,* 128 F.3d 1213 (8th Cir. 1997). Furthermore, if Defendant Tannehill did not act under color of law, and if no constitutional violation therefore occurred, the City of The Dalles cannot be liable. This is because a municipality cannot be liable under § 1983 where there was no underlying constitutional violation by an employee of the municipality. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L.Ed.2d 806 (1986).

A public employee acts under color of state law while exercising his responsibilities pursuant to state law. *Humke,* 128 F.3d at 1215. The plaintiff has previously admitted that Defendant Tannehill's acts of sexual abuse were

* * *

> Explorer program, and held itself out as a safe and trustworthy program to mentor and train young boys in matters relating to a

career in law enforcement and leadership." (Second Amended Complaint, ¶ 23.)

This special relationship necessarily ended on December 29, 1996, when the plaintiff resigned from the explorer program. Since the plaintiff and the City of The Dalles cannot have been in any special relationship after December 29, 1996, the City necessarily cannot be liable for any abuse or sexual contact with Defendant Tannehill after December 29, 1996.

DATED: Monday, April 19, 2004.

Respectfully submitted,

By: /s/ Jason M. Montgomery

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Trial Attorney:
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IN THE CIRCUIT COURT OF
THE STATE OF OREGON FOR
THE COUNTY OF MULTNOMAH

T.R., Plaintiff, vs. City of The Dalles, Oregon, a political subdivision of the State of Oregon, and The Boy Scouts of America, a congressionally chartered corporation, authorized to do business in Oregon; Cascade Pacific Council, Boy Scouts of America, an Oregon non-profit corporation; and James Donald Tamehill, Defendants.	Case No. 0206-05750 Volume 1

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Ellen Rosenblum, Judge of the Circuit Court of the County of Multnomah, State of Oregon, commencing at the hour of 9:14 a.m. on Tuesday, June 10, 2003.

APPEARANCES

Mr. Kelly Clark and Mr. Kristian Roggendorf
Attorneys at Law
Appearing on behalf of the Plaintiff;

Mr. Andrew Carter,
Attorney at Law
Appearing on behalf of Defendant Tannehill.

* * *

[79] PROCEEDINGS

THE COURT: Okay.

MR. FRANZ: Your honor, just by way of introduction, this is James Tannehill. He's representing himself.

THE COURT Okay. Good Morning, Mr. Tannehill.

MR. TANNEHILL: Good morning.

MR. JOHNSON: Judge, I'm Wesley Johnson. I'm (indiscernible audio). I'm the guy that (indiscernible audio) case in the beginning for (indiscernible audio) and I'm helping Jonathan with the case for trial.

THE COURT: Okay.

MR. CLARK: I'm sorry. I should have introduced Mr. Johnson. Your honor, this is Kristian Roggendorf from our office, another associate at O'Donnell & Clark.

THE COURT: What? I'm sorry. Last name?

MR. ROGGENDORF: Kristian Roggendorf.

THE COURT: Roggendorf. Okay. All right. So I've read through pretty much everything, and it seems to me that the first issue to deal with is defense – City of The Dalles motion to dismiss the claims. And let's go through that first, and then we'll go through the other motions in limine.

So, Mr. Franz, the first question I have in relation to – this is – if we just go straight to the [80] issue of plaintiff is being barred because of the two-year statute of limitations, and my reading on the case law in terms of *Blake* certainly would lead me to the conclusion that the two-year residual statute of limitations would apply.

On the other hand – and therefore, if I just take that straight, then two years after plaintiff becomes 18, that would limit it.

However, it seems to me that what the plaintiff is saying is that the issue of discovery didn't arise until the grand jury in 2001, and so whether or not the discovery rule applies and how that applies to any – I mean to any personal injury issue.

MR. FRANZ: And our answer to that is -- is the – I don't know how you pronounce it, *Plumeau*, P-l-u-m-e-a-u, *v. School District No. 40.* And that is discussed on Page 15 of our – way back in our supplemental –

THE COURT: Okay.

MR. JOHNSON: Page which was that?

MR. FRANZ: Page 15 of the supplemental memorandum, way back – no, are you looking at the trial memorandum?

THE COURT: I was. Okay. But you're going back to –

[81] MR. FRANZ: And I can -

THE COURT: And I actually read through them, but I didn't take notes on the files.

MR. FRANZ: And that was the case where the janitor at county of Yamhill was watching little girls and hugging them and holding their hands, and he did that at Memorial Elementary School. And he basically – to kind of – kind of understand the case, you have to have the outline of the dates.

And also on discovery statutes, the two-year statute of limitations under the Oregon Tort Claims Act is also a discovery statute. So I mean sort of 12.1 – they're both discovery statutes. So (indiscernible audio) the judge initially dismissed on the two-year statute of limitations under the Oregon Tort Claims Act, it's my position that's the law of the case because that's also a discoverable statute.

But anyway, Amanda, you know, was molested from '83 to '87 by the janitor. And then all through this time, there was complaints about this guy's behavior of touching kids and everybody and everything else.

So then, he's transferred to Adams School, and as soon as he's transferred to Adams School, a father of a girl complained and he was arrested for sexual abuse. And that was – that was like May of '87. So he's arrested [82] for – for abuse. And, you know, showed he abused 17 little girls or something.

Then what happened is in May 29 of 1992, Amanda attempts suicide. And at that time, she discloses to her mother – I think her mother's name is Barbara – the abuse. So then we have September 9, 1993. This is the second (indiscernible audio) of the bad guy. And May 10, give a tort claim notice. And then May 20, filed a lawsuit.

And so what the – what the Ninth Circuit was dealing with, the plaintiffs contended that it was not until the sentencing hearing that they realized for the first time Yamhill County was involved and the school district was involved and, therefore, their tort claim notice was timely. Because I think it's the 270-day, 12th grade notice for a minor. And therefore, their tort claim notice was timely if you take it from the September date.

And then I'm going to read you the language the Court said in addressing that issue. But bottom line is the Court said, no, you – you had knowledge on May 29th, knocked out the tort claim. So that left just the Section 1983 claim against the school district. Same allegations, custom and policy, failure to investigate.

And the Court said you came within the two-year statute of limitations because you filed within 20 – you [83] came within the two-year statute of limitations under Tort Claim Act – under the 1983 act, so your – so your action's timely. And then the Court went on to dismiss the case because there was no custom and policy of failing to investigate.

THE COURT: Well, so that would – dealing with the first issue, that it's two years from discovery, no knew or should have known, as opposed to the act.

MR. FRANZ: Right. Now, the discovery, though, the key in this case is the discovery. The plaintiff was the mom in her individual capacity, and the mom for the guardian ad litem. But the courts applied the two-year statute of limitations to the date they found out about the abuse, not any date of any custom and policy or anything else. It's the actual date of the acts.

So the date of the acts triggers the two-year statute of limitations, nothing else. And in this case, when Mr. Roth turned 18, he very well knew of the acts. What's more, he knew of the acts and he knew that the City was involved because it was the employer. And he contends that actually some of the abuse took place while he was an Explorer.

So our position is that because in that case the mom had a cause of action, they find it timely for the mom. And when the Court dealt with that issue of – and [84] the Court went on to talk about why it's the

date of knowledge of the abuse as opposed to learning more information (indiscernible audio).

So the Plumeaus, or however you pronounce the name, argued that because they only discovered that the school district may possibly have been responsible for Moore's action at the sentencing hearing on September 9, 1993, the May 11th, 1994, letter fell within the requisite 270 days after they discovered the alleged injury.

In other words, they're still trying to say, listen, we didn't know the school was involved until the sentencing hearing. The school district argues and the magistrate agreed that Plumeaus should have known that the school district was potentially liable for – for Amanda's long – abuse long before the victim's assistance worker relayed to them her theory of the case.

A plaintiff has a duty to use due diligence in an effort to discover the party responsible for her injury. The Plumeaus knew the abuse took place during school hours and on school property and that the abuser was a school district employee. We agree with the district court that these facts were sufficient to appraise the Plumeaus of the potential claims against the district for failure to supervise Moore.

So what we have in this case is the time line on

* * *

[170] sounds to me like your argument is one that would add another basis of liability for the City as opposed to having a liability for Mr. Tannehill.

MR. ROGGENDORF: Right.

THE COURT: So as to Mr. Tannehill in count –

MR. ROGGENDORF: Well, he's also personally – I mean, he would be personally liable as well for his – for the actions taken under 1983 under its policies. As a policymaking authority, a single action by a policymaker can impute liability individually.

I mean, he would still be liable individually, and the discovery of when that policy occurred, we would argue, triggers – would trigger the running of the statute of limitations, since we discovered it in actual depositions not so long ago.

THE COURT: But he's already in count – in this first claim, he's being – you have him individually. I'm just looking at your –

MR. ROGGENDORF: So the first – to the extent the first count is not concerning – what is it, policy or practice –

THE COURT: Mm-hmm.

MR. ROGGENDORF: – or custom, to the extent that it's directly based on the abuse, I would – I would have to concede that the first claim for relief against

* * *

[172] one that I was talking about that was in – so you've got against it, defendant Tannehill individually, and then violation of civil rights. So you're saying that that claim stands on its own and that you want to – and I'm not saying I would allow an amendment at this time, but –

MR. ROGGENDORF: I guess I'm saying that bottom line, we still have a claim under 1983 against Mr. Tannehill. Whether it conforms to what we have pleaded in the complaint, I believe there probably needs to be some clarification in the complaint, but to the extent that Mr. Tannehill could be considered a policymaker in and of himself, you know, on his own, I believe we have the evidence to support that, and I would ask to go ahead and conform our – our complaint to those – to those facts.

THE COURT: Mr. Tannehill, what did you want to say as to that?

MR. TANNEHILL: Well, the issue of me being a policymaker, since it seems to be a key here, is interesting because I never considered myself a policymaker. As was stated – and keep in mind that the policy that I was responsible for that I may have drafted related specifically just to the actions of the Explorers.

I drafted and wrote some procedures manual, as we called it, and I'm assuming this is what the

* * *

[177] a, you know, that's a – that's an argument that defense has raised throughout this, and so I'm going to go ahead and just have to accept that.

THE COURT: Okay. So the second claim of relief against Mr. Tannehill, the violation of federal civil rights, you're conceding it is outside the statute of limitations.

MR. ROGGENDORF: I believe that one has to be, yes.

THE COURT: Okay. So I just going in order.

MR. ROGGENDORF: Yes.

THE COURT: I will dismiss the second claim of relief.

MR. TANNEHILL: Can – can you explain that a little bit for me, the first – between the first and the second regarding the federal?

THE COURT: Well, the first claim of relief is simply a tort within the state and it's basically alleging the tort or the civil personal injury of sexual battery of a child, and that has a longer statute of limitations just because it's covered under state law, so there are six years after the child turns 18.

The second is under federal civil rights and under 1983, the case law's pretty clear that once the child turns 18, there are two years for them to file it or

* * *

[179] if this is a claim against the City of The Dalles –

THE COURT: And I have – right, so I do need clarification. My inclination is to say no at the last time, no to saying that this is the second amended complaint, so you've had plenty of time to deal with this. So I'm – I'm inclined to say no to any amendment, no matter who it's against.

MR. ROGGENDORF: Right, right.

THE COURT: So why don't you clarify who, for the record, who you're wanting to amend it against.

MR. ROGGENDORF: Well, actually that the Count 3 of what would be the third claim –

THE COURT: Which is against the defendant City of The Dalles.

MR. ROGGENDORF: Yes, we would – we would seek to actually add a claim – that we would add defendant Tannehill as a party to that insofar as he is personally liable for the decisions he made as a policymaker. So that would be the one.

And then the – of course, that does – and I think – I don't think there's any conforming amendment necessary to allege Tannehill as a policymaker in our claims against the City. I don't think – I don't think that's an additional count. I think – I think what we alleged against the City was that there was a custom, [180] policy, or practice. And that hasn't changed.

It doesn't matter who made that custom, policy, or practice as it pertains to the city. It's perhaps a

different theory of legal relief, but that certainly doesn't need to be set out in the complaint or alleged in a separate count. So it would –

THE COURT: Okay.

MR. ROGGENDORF: So it would simply be to add Mr. Tannehill to the third – to the third claim.

A MAN: Your Honor, still not clear. The phrase add Mr. Tannehill to be liable individually, I guess I just need clarification. Is this a claim against the City for defendant Tannehill's actions as a final policymaker?

THE COURT: If I understand, counsel's indicating that based on the case he's cited that – I mean, a municipality can delegate authority to someone, for example, in Mr. Tannehill's situation, and if Mr. Tannehill violates that, then he can be held individually liable. But it does not take – it doesn't indemnify, essentially, the municipality. So it would just be an additional. I don't see it as – anyway.

I think at this late hour, I'm not going to allow an amendment that adds a pretty different claim in relation to Mr. Tannehill, so I would not allow that.

MR. TANNEHILL: Your Honor?

* * *

[1199] THE COURT: And the motion, right. So let's just as a group take ten minutes.

MR. FRANZ: Why don't you give us 15?

THE COURT: Okay. And then my thought is we'll do the motion, we'll get as much done as we can done till 4:30. I'm going to scoot out of here and we'll meet back at 7:30 and finish up.

MR. FRANZ: Sounds good.

THE COURT: Okay. Thank you.

(Recess taken, 3:28-3:51.)

THE COURT: Okay.

MR. FRANZ: Okay, Your Honor, at this time, pursuant to the Rule 60 of the Oregon Rules of Civil Procedure, I want to move for a directed verdict on each of the counts of the federal claim against us. Now, first of all, I want to move for the entire claim on the grounds of statute of limitations. And here's a case that my associate came up with last night.

The – you've already ruled the two-year statute of limitations applies, so we're okay there. And you've knocked out Tannehill on the two-year, because it was more than two years from the occurrence date.

Our – our position is *Monell,* where custom and policy does not toll the statute of limitations, especially in the situation where you have knowledge of [1200] the employer, knowledge that some of the acts took place on-duty (indiscernible audio) that information.

The case I just gave you was a sexual abuse case in a jail. Plaintiff argued that she was unaware of any city policies or customs; thus the two years extended

and the Court said no, it doesn't. In that case, there's also an alternate holding that her claim didn't state a claim of relief, but the Court clearly rules that *Monell* does not extend the statute of limitations. And that's been our position all along.

I don't know what – you know, when we first argued, they said that the plaintiff was going to testify that he learned something at grand jury, that somehow it triggered his knowledge that there were customs and policies. And all he testified to was that he learned at grand jury that other police officers knew – knew Tannehill was gay. And that made him mad that they all knew he was gay, that everybody knew.

THE COURT: Well, no, my – that wasn't my recollection of his testimony. It's my recollection was that they all knew that this stuff was going on and that nobody – and that they could have done something and didn't until now.

MR. FRANZ: But they – no one else knew something was going on. There's no evidence of that. [1201] Furthermore, stuff's going on. Webb – the Webb incident was publicized, so I don't know what he learned that somehow established a policy of – custom of policymakers. And I think once this issue is sorted out on appeal, it's going to be a bright line rule that if you know the name of the employer and you know somehow some of the acts took place on duty, policy and custom does not control that statute of limitations.

Versus a situation where the abuse maybe took place always at home by somebody not connected with the department. Because I don't think the Ninth Circuit – or it's going to be the Court of Appeals is going to allow somebody to have an unlimited statute of limitations.

And the second – and I'll go just back to their –

THE COURT: So you don't want them to answer one by one; you want to go through everything and –

MR. FRANZ: Yeah, I think we'll really go fast that way.

THE COURT: Okay.

MR. FRANZ: And then the – we seem to – we seem to be – I'm not sure what their theory is on the – I thought their theory was that we failed to respond to a sexual complaint about Tannehill and that we ignored the complaint and our – and that we did so with – with a

* * *

[1246] MR. FRANZ: See, the policymaking authority has to be delegated and that – and it just was not delegated to Tannehill. There's no evidence –

MR. JOHNSON: It's a factual issue.

MR. FRANZ: I don't think so.

THE COURT: Well, it's the policymaking or lack thereof that allows the actions to occur, correct? I

mean, and it's like if the policymaking allows the Constitutional violation, then the policymaker is liable, correct?

MR. FRANZ: Yeah, if – if the policymaker says, Go search that building like that *Plumeau,* and it's illegal, the policymaker is liable and the City's liable if he's a policymaker. Because the act of the policymaker –

THE COURT: So in this, it's the government's liable for other people to whom they delegated policymaking authority is what you were saying?

MR. JOHNSON: Right, that's what it says. That's exactly what it says.

MR. FRANZ: I'm objecting –

MR. JOHNSON: Only – only if that policymaking authority is delegated, and that's what it says.

MR. FRANZ: Well, my –

MR. JOHNSON: He can argue certainly that – [1247] that Tannehill was not delegated that.

MR. FRANZ: But there's no facts that he was.

MR. JOHNSON: I think there's a lot of facts that he was. I mean – we tried to reiterate it every which way. Real clear about it. Waterbury, they both said that the other person was the one that was

supervising. They didn't know anything about it. And then – then Tannehill said the same thing.

MR. FRANZ: He –

MR. JOHNSON: They didn't supervise him.

MR. FRANZ: Failure to supervise is not delegating –

MR. JOHNSON: They delegated the whole program to him. And that's what we'll argue and I think we had evidence to support it.

THE COURT: Okay. I'll allow that instruction and note the defendant's objection. Okay. Well, and then this 41 is just reiterating essentially what's in the other.

MR. JOHNSON: Yeah, and this is – this is –

THE COURT: And the same with 42, because you're saying in the other one that it is – that they are liable, so 41 and 42 out. Forty-three.

MR. FRANZ: You know, so the record's clear, you know, I'm requesting the Court to state that Tannehill's [1248] not a policymaker based on the evidence, and so I make that motion.

THE COURT: Okay. And although I think that there is incredibly slim evidence of that, there is enough that a finder of fact could find that. But I – you know. So I'll deny the motion.

Forty-three, no. And that's the same thing. We've already dealt with we did not know as not being an instruction so 44, no. Forty-five.

MR. JOHNSON: (Indiscernible audio) 45 (Indiscernible audio).

THE COURT: Okay. Forty-six. I think that's argument for you to make. Forty-seven. I think again, that's argument. I mean, that's what your argument is. That's what you're saying the policy – custom, policy, and practice is, is the lack of investigation, right? I mean, so –

MR. JOHNSON: Definitely.

THE COURT: Okay. Forty-eight. Admissions. Isn't – don't we have a general –

MR. FRANZ: Admission against party, yeah.

THE COURT: Oral admissions.

MR. JOHNSON: Yeah.

THE COURT: Okay. So out.

MR. JOHNSON: And then 49 is covered, I think,

* * *

[1265] MR. JOHNSON: – completely. We're just looking at when – when the claim was filed. And it looks like June 11th, 2002, is the filing day. I don't see a service day, so –

MR. FRANZ: Well, it was within 60 days, so it's got to relate back to service. But our position is when you filed this – added this Section 1983 claim on July 7, 2003, that's –

THE COURT: Well, when's the grand jury?

MR. FRANZ: October 2001.

MR. CLARK: Yes.

MR. FRANZ: Or sometime 2001.

THE COURT: So it either is or – I mean, frankly, whether it's the first or the second date is not going to matter. I mean, the issue is – I mean, they're both within that two years you're talking about (indiscernible audio) applies.

So let's use the July date so that we're not messed up with that. And so July 7th what, 2003?

MR. FRANZ: Right.

THE COURT: 2003, and so then to prevail on the statute of limitations defense, defendant must prove that before July 7th, 2001?

MR. FRANZ: Right.

THE COURT: 2001, the plaintiff either knew or [1266] in the exercise of reasonable care should have known the fact which would make a reasonable person aware of the substantial possibility that the defendant's – and so here we want to put defendant City of The Dalles.

MR. JOHNSON: Why don't we just take out defendants and say the city of The Dalles?

THE COURT: Okay. That the (indiscernible audio). Should have known.

MR. FRANZ: Are we still with it? Do we need any changes to the verdict form?

MR. JOHNSON: Yeah.

MR. FRANZ: I mean, do we have a final one? We got to get that thing so we know where it's going –

MR. JOHNSON: We need to work on –

THE COURT: So we just want the city of The Dalles caused the plaintiff some injury.

MR. FRANZ: What paragraph is that?

THE COURT: I'm still at the bottom of the second paragraph. So the city of The Dalles caused the plaintiff some harm?

MR. FRANZ: Yeah.

THE COURT: Okay. And then (indiscernible audio).

MR. FRANZ: Are you just calling them – just calling them claims, since there's only (indiscernible

* * *

[1341] R. Franz – Clsg Argmt

Now, I want to go to that question I told you on the verdict form. It says, On what date did plaintiff discover that he had a claim against the city of The Dalles? And so you're saying, what's that all about?

I don't know if you've heard of statute of limitations, and I think, you know, there's a mention of it in the criminal, but the statute of limitations is a statute that limits the time you can do something. And the Court's going to – and it's our burden to prove. It's the defendant's burden to prove the statute of limitations.

The Court's going to basically tell you in the instruction. The lawsuit was filed – the statute of limitations, you know, he had a certain time to file his lawsuit, basically stated. July 7 of 2003 the lawsuit was filed. It's a two-year statute of limitations. So you have two years to file a lawsuit from the date – I'm just going to quickly say date of injury. I'll read the exact wording. So July 7, 2001.

Now, the Court's going to instruct that the plaintiff's date was – the defendant must prove that before this date, so we do my favorite time lines. We go all the way – all the way from July 7 all the way to 1996. Now, the defendant, the City, must prove that between this period of time, the plaintiff either knew or [1342] in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that the defendant – defendant's conduct caused the plaintiff harm.

That's why we got into all of that conversation about when you were a victim, when did you know you were a victim. Remember I asked him the question in his deposition, You said at the time these acts were happening, you knew it was a crime? And then I was saying that you were taught that there was – offensive touching is harassment?

Because it's my position that – or the City's position that – and let's take – let's take a date that he – that he leaves the Explorers, give him the best date of December '96. And that's after all the alleged – that's after the – at least the abuse when he was an Explorer.

My position is that he had to file his lawsuit two years – within two years after that date. So my – my position is that by December of 1998, the lawsuit had to be filed. And that the lawsuit is filed seven years later, it's not.

Their position is no, that's – that the grand jury hearing somehow triggered these two – you remember the grand jury hearings, fits right into the period they [1343] need to. My position is that at some time from 1996 to July 7, a reasonable person would have realized that they were harmed or a victim. So that's why those questions were (indiscernible audio).

You're going to be asked to write down a date on the verdict form of when he realized the statute of limitations and, of course, the date that I want written in, you know, is December 1996.

And if it's getting so close – and if it's before this date, it's never occurred to me what if you just put December of '96, never thought in terms of whether you actually have to put the numerical date number, but if you put a date in there that would be covered, like, for example, you wrote in there December '96, clearly the claim's barred. And it's barred completely.

So you could just say the City, you guys were terrible, you knew, you abused, but it's statute and the claim's completely barred as to – because of the two-year statute. That only applies to the City. Does not apply to Mr. Tannehill. So that's what that – all that's going to be about.

Now, to summarize, I have our list of the things that they contend we should have known. Our position is that we did not know that the plaintiff – we didn't get

* * *

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant v. **The Boy Scouts of America,** a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America,** an Oregon non-profit corporation, and **James Daniel Tannehill,** Defendants below and **City of The Dalles,** a political subdivision of the State of Oregon, Defendant-Appellant Cross-Respondent.	) Multnomah County) Circuit Court) Case No.) 0206-05750) **CA A125742**

BRIEF OF DEFENDANT-APPELLANT CROSS-RESPONDENT CITY OF THE DALLES AND EXCERPT OF RECORD

Appeal from the Judgment entered on August 16, 2004,
Multnomah County Circuit Court
of the State of Oregon
The Honorable Alicia Fuchs, Judge

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January, 2005

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ASSIGNMENTS OF ERROR

First Assignment of Error.

The trial court erred in denying Defendant City of The Dalles' Motion for Directed Verdict on the grounds that plaintiff's claims were barred by the statute of limitations.

A. Preservation of Error.

At the close of the evidence, Defendant City of The Dalles moved for a directed verdict on the grounds that the plaintiff's claims under 42 U.S.C. § 1983 were barred by the two-year statute of limitations. Counsel for Defendant City of The Dalles argued:

> "MR. FRANZ: Okay, Your Honor, at this time, pursuant to the Rule 60 of the Oregon Rules of Civil Procedure, I want to move for a directed verdict on each of the counts of the federal claim against us. Now, first of all, I want to move for the entire claim on the grounds of statute of limitations." (Tr. 1199).
>
> The trial court denied this motion.
>
> Okay. I might as well also put on the record that the motion for directed verdict was denied by the Court finding that there is enough evidence to go to the jury and dismissal motion is denied." (Tr. 1243).

B. Standard of Review.

In reviewing the denial of a motion for a directed verdict, this Court views the evidence, including all reasonable inferences drawn therefrom, in the light most favorable to the plaintiffs. *Lanz v. Douglas Tool & Engineering, Inc.,* 138 Or. App. 89, 92, 907 P.2d 1128, 1130 (1995). The verdict must be set aside where there is no evidence from which a reasonable jury could find facts sufficient to establish the elements of the claims. *Id.*

C. Argument.

The only claim against the City of The Dalles in the Second Amended Complaint, was a claim brought pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides a cause of action to a person whose rights under

federal law have been deprived by a person acting under color of state law. 42 U.S.C. § 1983. Plaintiff has alleged a violation of his Fourteenth Amendment rights by Defendant Tannehill, who the plaintiff alleges acted under color of law.

The statute of limitations applicable to a claim under 42 U.S.C. § 1983 is Oregon's general residuary personal injury statute of limitations of ORS 12.110(1), which is a two-year statute of limitations. *Owens v. Okure,* 488 U.S. 235, 109 S. Ct. 573, 102 L.Ed.2d 594 (1989); *Sain v. City of Bend,* 309 F.3d 1134, 1139-40 (9th Cir. 2002). The purpose of a statute of limitation is to prevent assertion of stale claims against a defendant. *Azer v. Connell,* 306 F.3d 930, 937 (9th Cir. 2002).

To determine when the plaintiff's § 1983 cause of action accrued for the purposes of the statute of limitations, this Court must apply federal law. *Johnson v. State of Cal.,* 207 F.3d 650, 653 (9th Cir. 2000). "Under federal law, a claim accrues when the plaintiff knows, or should known, of the injury which is the basis of the cause of action." *Id.*

It is important to first note the duration of time that is involved in this case. Plaintiff did not file his First Amended Complaint until July 7, 2003, more than seven years after the abuse in January through March of 1996. With the abuse as the date of accrual, the plaintiff had no later than March of 1998 to file his claim against the City of The Dalles. Plaintiff's position is that this more than five year delay in

filing his claim is excusable in the case at bar. The City contends for the reasons below, that the plaintiff has failed to show any legal justification for this delay. Moreover, it is important to keep in mind the purpose of the statute of limitations – to prevent stale claims. This case ultimately went to trial more than eight years after the abuse. In addition to evidence concerning the plaintiff's abuse, the trial court also admitted evidence of the Webb incident, which occurred in 1993. Thus, some of the City's witnesses were questioned about an incident that had occurred more than 10 years in the past. The staleness of the plaintiff's case arguably may have had significant impacts on the abilities of the witnesses to recall events, and may have impacted their testimony, and the jury's impression of their testimony. The statute of limitations is especially important in the case at bar, where time can have a significant impact on the ability of the defendants' witnesses to recall events and testify in their defense.

* * *

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant v. **The Boy Scouts of America,** a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America,** an Oregon non-profit corporation, and **James Daniel Tannehill,** Defendants below and **City of The Dalles,** a political subdivision of the State of Oregon, Defendant-Appellant Cross-Respondent.	Multnomah County Circuit Court Case No. 0206-05750 **CA A125742**

COMBINED REPLY BRIEF AND CROSS ANSWERING BRIEF OF DEFENDANT-APPELLANT CROSS-RESPONDENT CITY OF THE DALLES

Appeal from the Judgment entered on
August 16, 2004, and the Supplemental Judgment
entered on January 6, 2005,
Multnomah County Circuit Court
of the State of Oregon
The Honorable Alicia Fuchs, Judge

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May, 2005

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* * *

I. Statute of Limitations.

Plaintiff's argument with respect to the statute of limitations is summarized as follows:

> "The discovery rule applies here because plaintiff at the time of his molestation, and up until his grand jury testimony, had no way of knowing the extent of the City of the [sic] Dalles' employees' knowledge that Tannehill was crossing boundaries by spending time alone with him and serving him alcohol. He had no way of knowing of the Webb affair cover up, the 'head in the sand' response to Boy Scout policies, or the fact that former-Chief Hill,

> Chief Waterbury, and Captain Goodman had received reports of Sgt. Tannehill spending time with plaintiff several times a week in violation of Boy Scout policies and that they simply ignored this fact." (Plaintiff-Respondent's Opening Brief pp. 14-15).

There is no dispute, however, that the plaintiff knew of the facts forming the basis of his cause of action against Defendant Tannehill at the time that the sexual abuse occurred from January through March 1996. Plaintiff could have, and should have, filed his action against Defendant Tannehill by March 1998. Plaintiff's failure to do so barred his section 1983 claim against Defendant Tannehill, as the trial court recognized and held.

There is also no dispute that at the time of the alleged sexual abuse the plaintiff knew that Tannehill was an employee of the City, and that some of the alleged acts of sexual abuse took place while Tannehill was on duty, in his patrol car, and during Explorer Scout functions. Plaintiff's knowledge of the alleged acts was further supported by his testimony that he attempted to tell Officer Kirk and Officer Nelson about Tannehill, and got no satisfactory response. In addition, the plaintiff was fully aware of the chain of command from his Explorer Scout training.

The trial court acknowledge that the plaintiff had this knowledge when it found that the plaintiff's tort claim against the City was barred by the two-year

statute of limitations period of the Oregon Tort Claims Act. Plaintiff does not appeal this ruling.

Through the institution of a timely lawsuit against Tannehill and the City, the plaintiff could have discovered everything he eventually did about the City of The Dalles. There certainly was no excuse for failing to pursue his claims against Defendant Tannehill and the City of The Dalles within two years of the abuse. Indeed, the plaintiff offers none. The plaintiff also had no excuse for waiting until July 7, 2003, to file his claim under 42 U.S.C. § 1983 against the City of The Dalles; this occurring more than seven years after the abuse.

There is simply no legal basis for choosing not to pursue one's claims for more than seven years – more than five years beyond the statute of limitations – and then filing suit. That was the plaintiff's choice. If the plaintiff's position is correct, then the effective rule is that no statute of limitations applies to municipalities in a 42 U.S.C. § 1983 action. In other words, a plaintiff may sit on his rights indefinitely, until some event takes place years later, which the plaintiff claims alerted him to a cause of action against a city, even though that event gave the plaintiff no new information upon which to base a claim against the city.

The rule to apply is very simple and straightforward: Once a plaintiff is aware of, or should have been aware of the following facts, the statute of limitations bars his claim: 1) that the tortfeasor was

employed by a municipality, the name of which the plaintiff knows; and 2) that at least one of the alleged acts of abuse, including acts of

* * *

IN THE COURT OF APPEALS OF
THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant v. THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation, and JAMES DONALD TANNEHILL, Defendants below and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Appellant Cross-Respondent.	Multnomah County Circuit Court Case No. 0206-05750 **CA A125742**

**PLAINTIFF-RESPONDENT,
CROSS-APPELLANT'S PETITION
FOR RECONSIDERATION**

Opinion of this Court filed April 19, 2006
Appeal from the Judgment entered August 16, 2004,
and the Supplemental Judgment
entered January 6, 2005
Multnomah County Circuit Court
of the State of Oregon
The Honorable Alicia Fuchs, Judge

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May 17, 2006

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* * *

this Court's opinion hinge – were not directly discussed in the briefing below, though *Kubrick* was cited by Plaintiff in the discussion concerning when a Section 1983 claim accrues. The general issue of the statute of limitations was also discussed in briefing below, but this Court's opinion focused squarely on the impact of *Kubrick* without considering cases relating to the question of accrual versus tolling. Also, given the rulings below related to Plaintiff's discovery of his claims against the City, there was no argument needed to explain the nature of delayed discovery in child abuse cases or in this case in particular. Thus, the issue of how the Oregon discovery rule affects the tolling of the statute of limitations for Plaintiff's Section 1983 claim was not briefed or argued either in this Court or below. Additionally, there has been nothing in the way of argument or briefing concerning the policy considerations that drove *Kubrick,* the distinct nature of child sexual abuse and its psychological effect on children and the resulting implications for the accrual of claims under Section 1983, or the impact of psychological avoidance mechanisms arising from child abuse the details of the Ninth Circuit ruling in *Plumeau.*

II. QUESTIONS PRESENTED ON RECONSIDERATION

A. Does the Oregon discovery rule – applicable to ORS 12.110(1) under *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966) – serve to toll the running of the statute of limitations in a Section 1983 suit following federal accrual of the claim?

B. Do the psychological realities of child abuse, whereby a child sexual abuse victim is faced with avoidance mechanisms brought about by the abuse itself, prevent the application of an accrual doctrine of the type set out in *Kubrick* and its progeny and applied by the Court here, given the stated policy considerations underlying the reasoning in those

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IN THE COURT OF APPEALS OF
THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant v. **The Boy Scouts of America,** a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America,** an Oregon non-profit corporation, and **James Donald Tannehill,** Defendants below, and **City of The Dalles,** a political subdivision of the State of Oregon, Defendant-Appellant Cross-Respondent.	) Multnomah County) Circuit Court) Case No.) 0206-05750)) **CA A125742**)) (Filed Jun. 7, 2006)

DEFENDANT-APPELLANT CROSS-RESPONDENT CITY OF THE DALLES' RESPONSE TO PETITION FOR RECONSIDERATION

Opinion of this Court filed April 19, 2006
Appeal from the Judgment entered on August 16, 2004, and the Supplemental Judgment entered on January 6, 2005, Multnomah County Circuit Court of the State of Oregon The Honorable Alicia Fuchs, Judge

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* * *

I. Introduction.

Plaintiff has filed a Petition for Reconsideration seeking to have this Court reconsider its reversal of the trial court's denial of the Defendant's Motion for a Directed Verdict. In its opinion, this Court held that the plaintiff's cause of action under 42 U.S.C. § 1983 accrued at the time that he was sexually abused, and that his claims were barred by the statute of limitations.

Plaintiff's argument in his petition for reconsideration is that the statute of limitations in this case was tolled by Oregon's discovery rule, and that, because the plaintiff's Section 1983 claim was timely filed using Oregon's discovery rule, this Court erred by failing to apply Oregon's discovery rule in the case at bar. The plaintiff then supports his position with new arguments and new hearsay evidence that is being presented to this Court and the parties for the first time in his Petition for Reconsideration.

The problem with the Plaintiff-Respondent, Cross Appellant's Petition for Reconsideration is threefold. First, none of the arguments and contentions assigned

as error in the Petition for Reconsideration has ever been raised before his Petition for Reconsideration. Thus, the plaintiff's arguments are not a proper basis for reconsideration.

Second, Oregon's discovery rule is a rule applied by the Oregon courts to determine when a cause of action of a state claim accrues. The federal discovery rule is a rule applied by the federal courts to determine when a cause of action of a federal claim accrues. Because federal law, not state law, is used to determine when a Section 1983 action accrues, this Court was correct in applying the federal discovery rule, and not the Oregon discovery rule.

Third, the plaintiff's claims are barred by the statute of limitations, regardless of whether the federal or Oregon discovery rule is applied, because the discovery rule under both federal and Oregon state law is used to determine when a cause of action accrues, and both rules are substantially the same.

II. Argument.

A. Plaintiff has Waived any Argument that his Cause of Action under 42 U.S.C. § 1983 was Tolled by Oregon Law.

Before an appellate court may address whether a trial court committed an error in any of the particulars of the trial of a case, the adversely affected party must have preserved the alleged error in the trial court, and then raised the issue and argument on appeal by an assignment of error in its opening brief.

Ailes v. Portland Meadows, Inc., 312 Or. 376, 380, 823 P.2d 956

* * *

IN THE SUPREME COURT
OF THE STATE OF OREGON

T.R., Plaintiff-Petitioner on Review, v. THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL, Defendants below, and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Respondent on Review,	Multnomah County Circuit Court Case No. 0206-05750 **CA A125742**

PETITION FOR REVIEW

Date of Decision of the Oregon Court of Appeals:
April 19, 2006 Opinion by Schuman
Concurring: Landau, Presiding Judge and
Deits, Judge *pro tempore* In and Appeal from the
Judgment of Multnomah County Circuit Court
the Honorable Alicia Fuchs, Judge

Petitioner intends to file a Brief on the Merits

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October 9, 2006

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T.R., Plaintiff-Petitioner on Review, v. **The Boy Scouts of America,** a congressionally chartered corporation, authorized to do business in Oregon; **Cascade Pacific Council, Boy Scouts of America,** an Oregon non-profit corporation, and **James Daniel Tannehill,** Defendants below, and **City of The Dalles,** a political subdivision of the State of Oregon, Defendant-Respondent on Review.	) Multnomah County) Circuit Court) Case No.) 0206-05750)) **CA A125742**) **SC S54071**

RESPONSE TO PETITION FOR REVIEW OF PLAINTIFF BY CITY OF THE DALLES

Appeal from the Judgment entered on August 16, 2004,
Multnomah County Circuit Court
of the State of Oregon
The Honorable Alicia Fuchs, Judge

Date of Decision of the Oregon Court of Appeals:
April 19, 2006.

Reversed with Opinion by David Schuman, Judge
Concurring: Jack L. Landau, Presiding Judge
Mary J. Deits, Judge *pro tempore*

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Notice:
If review is allowed, the Respondent intends to file a brief on the merits

October, 2006

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IN THE SUPREME COURT
OF THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant, Petitioner on Review v. THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon nonprofit corporation; and JAMES DONALD TANNEHILL, Defendants below, and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Appellant, Cross-Respondent, Respondent on Review,	Multnomah County Circuit Court Case No. 0206-05750 **CA A125742** **S 054071**

PETITIONER'S BRIEF ON THE MERITS

Date of Decision of the Oregon Court of Appeals:
April 19, 2006
Opinion by Schuman
Concurring: Landau, Presiding Judge and
Deits, Judge *pro tempore*
In an Appeal from the Judgment of
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RESPONDENT ON REVIEW CITY OF THE DALLES' BRIEF ON THE MERITS

Appeal from the Judgment entered on
August 16, 2004, and the Supplemental
Judgment entered on January 6, 2005,
Multnomah County Circuit Court
of the State of Oregon
The Honorable Alicia Fuchs, Judge

Date of Decision of the Oregon Court of Appeals:
April 19, 2006.

Reversed with Opinion by David Schuman, Judge
Concurring: Jack L. Landau, Presiding Judge
Mary J. Deits, Judge *pro tempore*

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* * *

If the State of Oregon had a public policy as stated by the plaintiff, then there would be no statute of limitations in abuse cases against public bodies in the State of Oregon, or the legislature would enact longer statute of limitations periods against public bodies in child abuse cases. However, that has not happened, and the public policy in the State of Oregon as it relates to claims against public bodies is to time-bar state claims like the one presented to this Court in this case.

It should also be noted that it has also been the public policy of every state court in the United States to follow federal law in Section 1983 cases, and to impose the federal accrual laws in Section 1983 cases filed in state court.

Thus, what the plaintiff is really asking this Court to do in this case is to (1) refuse to follow the public policy of the State of Oregon which bars stale claims against a public body, and (2) refuse to follow the public policy of all the states in applying federal accrual rules to Section 1983 claims litigated in state court. And, the plaintiff wants this Court to do so by holding that a non-existent tolling "discovery" rule trumps federal law, with the end result that although the plaintiff has absolutely no state law claim that is not time-barred in the State of Oregon, the plaintiff does have a claim under federal law.

In other words, the plaintiff wants this Court to ignore federal law, and allow a federal claim for relief to proceed against a City, more than two years after it accrued under federal law, when the courts in the State of Oregon will not allow the same plaintiff to proceed with any state law claims in their courts, because such claims accrued under state accrual law more than two years before the claim was filed, and when the same state courts have found as a matter of law that the same federal claim asserted against an individual is time-barred, because the same federal claim accrued more than two years before the filing of the lawsuit against that individual. Defendant strongly doubts that the Supreme Court of the United States is going to allow such a result in any court in any state of the United States.

B. <u>The Plaintiff Cannot Circumvent the Federal Rule of Law that Determines when a Section 1983 Claim Accrues and the Statute of Limitations begins to Run, by Applying Oregon's Law of Accrual by Characterizing Oregon's Accrual Law as a Tolling Provision.</u>

The plaintiff impliedly concedes that under the federal accrual rule of law, his Section 1983 claim against the City of The Dalles is time-barred as explained by the Court of Appeals. Thus, in order to avoid the holding of the Court of Appeals, the plaintiff is now contending that the "discovery" rule, created by the case law of the State of Oregon in order to determine when a claim for relief accrues under Oregon law, is not really a rule of law that governs the accrual of a claim; but rather, it is a tolling provision. And, because it is a tolling provision, all courts in Oregon (both federal and state) must use the accrual "discovery" rule of the State of Oregon in all Section 1983 claims,

* * *

A reasonable person would have known or should have known that he had a claim against the City for the injuries plaintiff incurred.

However, one additional point needs to be made.

The plaintiff's entire basis for claiming that his Section 1983 claim against the City is not time-barred is because of what the plaintiff learned at the Grand Jury proceeding in October of 2001. Thus, it only follows that if the plaintiff already knew what he

learned at the Grand Jury hearing, then the time his Section 1983 claim accrued was at the time he learned the same information he learned at Grand Jury. Thus, all this Court has to do is review the record and see if the plaintiff already knew the information he discovered at the Grand Jury proceeding, and then determine if the plaintiff learned this information more than two years before he brought his Section 1983 claim against the City; i.e. two years prior to July 7, 2003.

Based upon the undisputed facts, everything the plaintiff learned at Grand Jury, he already knew at the time he resigned his position as an Explorer in December of 1996.

To prove this point, one first needs to know what the plaintiff learned at Grand Jury. It is the City's position, that as a matter of law, the plaintiff learned nothing. He did not hear any of the testimony, and he did not talk to anyone. What he learned was based solely upon the fact that he just saw everybody sitting around. In other words, what the plaintiff claimed he leaned was not

* * *

IN THE SUPREME COURT
OF THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant, Petitioner on Review v. THE BOY SCOUTS OF AMERICA, Incorporated, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL; Defendants below, and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Appellant, Cross-Respondent, Respondent on Review.	Multnomah County Circuit Court No. 020605750 CA A125742 SC S054071

AMICUS CURIAE BRIEF
OF STATE OF OREGON

Review of the Decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County Honorable Alicia Fuchs, Judge

Opinion Filed: April 19, 2006
Author of Opinion: Schuman, J.
Concurring Judges: Landau, P.J.
and Deits, J. *pro tempore*

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IN THE SUPREME COURT
IN THE STATE OF OREGON

T.R.,

Petitioner on Review

v.

THE BOY SCOUTS OF AMERICA,
a congressionally chartered corporation,
authorized to do business in Oregon;
CASCADE PACIFIC COUNCIL,
BOY SCOUTS OF AMERICA,
an Oregon nonprofit corporation) and
JAMES DONALD TANNEHILL,

Defendants,

CC 0206-05750
CA A12742
SC S054071

---

and

CITY OF THE DALLES,
a political subdivision of
the State of Oregon,

Respondent on Review.

PROCEEDINGS
JUNE 19, 2007

BE IT REMEMBERED that the above mentioned transcript was transcribed by Vicki L. Jesse on May 29, 2008.

* * *

[55] doesn't have an independent – at least didn't plea an independent cause of action in that case.

They plead a claim for the minor. So if you're going to use apples and apples, that kid also knew at the last act of abuse that she had been injured and that it was a school janitor that did it. Sure she was younger but she was still a minor.

JUSTICE BALMER: Hasn't the legislature taken care of that to the extent that it's not appropriate with the tolling for minority?

MR. CLARK: Yes, but it doesn't explain Plumeau because the statute still would have expired. So unless the Court of appeals got it wrong, unless the ninth circuit got it wrong, then they must have applied some sort of a state law to tolling provision, which is why we have argued Plumeau from the very beginning. It must mean something.

JUSTICE GILLETTE: You know, we're in an odd spot in that regard and I need to have your explanation about this. Plumeau is a ninth circuit decision ultimately and neither the state legislature nor we are bound by it except with respect to the facts of the specific case.

I mean, it may purport to state all kinds [56] of general propositions of the law but the short answer to that nonsense.

MR. CLARK: That's right.

JUSTICE GILLETTE: Nice to have your opinion. Drop by when you have a better idea.

MR. CLARK: That's right.

JUSTICE GILLETTE: And so it's not binding on us. It's not binding on any of God's children except the federal court's themselves.

MR. CLARK: That's right.

JUSTICE GILLETTE: So you keep talking about it. Mr. Franz keeps talking about it. My attitude is ho hum. I don't care what it says. Unless it inherently persuades, it's a nothing. And you admit that, do you not?

MR. CLARK: Yes, I do. I do.

JUSTICE GILLETTE: Okay.

MR. CLARK: Which gets back to Justice Kistler's question about the source of accrual law.

As I understand the question, the best answer I can give you is I think everybody is reasoning by analogy from the federal tort claims context. That's the best we can do. And that's why I keep jumping up and down and saying a tort claims case is different because you automatically know or

* * *

[59] CERTIFICATE

I, Vicki Jesse, do hereby certify that the matter herein mentioned on the preceding title page was

trascribed. I transcribed all requested audio in its entirety in the foregoing matter; and that the foregoing transcript pages constitutes a full, true and correct record of such audio.

IN WITNESS HEREOF, I have hereunto set my hand this 29th day of May, 2008.

/Signed

Vicki Jesse

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SUPREME COURT, U.S.

No. 07-1553

In The
Supreme Court of the United States

CITY OF THE DALLES,
A political subdivision of the State of Oregon,
Petitioner,

v.

T.R.,
Respondent.

On Petition For A Writ of Certiorari
to the State of Oregon

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state Supreme Court err when it applies the appropriate federal standard for the accrual of the statute of limitations in Sec. 1983 cases if it also refers to state cases that apply the same rule?

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OPINION BELOW

The opinion of the Supreme Court of Oregon is reported at *T.R. v. Boy Scouts of America*, 344 Or. 282, 181 P.3d 758 (Or. 2008). The opinion of the Oregon Court of Appeals is reported at *T.R. v. Boy Scouts of America*, 205 Or.App. 135, 133 P.3d 353 (Or.App. 2006). The opinion of the trial court is unreported.

JURISDICTION

The Supreme Court of Oregon filed its opinion on March 13, 2008. Petitioner invoked this Court's jurisdiction under 28 U.S.C. § 1254(1). This brief in opposition is being filed within the 30-day period prescribed by Rule 15 of the Court, as computed in accordance with Rule 30 of the Court.

STATEMENT OF THE CASE

Petitioner's only meaningful objection to the decision below is against the jury's factual determination regarding the reasonableness of the timing of Plaintiff's filing – and not with the legal standard applied.

Plaintiff was sexually molested by a police officer and his Explorer Scout leader, James Donald Tannehill, for several years, commencing in 1996, when he was 16 years-old. Tannehill groomed Plaintiff with compliments regarding his body, alcohol, and sexual comments. Plaintiff was rebuffed when he asked other officers about Tannehill.

Five years later, though, he learned through a newspaper article and then state police questioning at a grand jury proceeding, that the City of Dalles police department had acted with deliberate indifference to the sexual abuse of children by its officers, a policy that directly affected him. Before that time, he did not know that there was a city policy of deliberate indifference.

Both parties agree that the law governing the issue of deliberate indifference under Sec. 1983 is found in Oregon's two-year general personal injury limitations, OR. REV. STAT. ANN. § 12.110(1) (West 2008), which establishes a two-year limitation. The parties also agree that the question before the courts with respect to this claim has been when the claim for deliberate indifference should accrue.

Petitioner makes the illogical claim that Plaintiff should have known of the city's policy of deliberate indifference at the time of Tannehill's sexual molestation of Plaintiff. Plaintiff, however, could not have discovered the city's constitutional violations until 2001 when he learned of the city's policy of deliberate indifference through the grand jury proceedings against Tannehill, where Plaintiff was asked to testify during a process that included numerous city personnel also testifying. *T.R. v. Boy Scouts of America*, 344 Or. 282, 181 P.3d 758 (Or. 2008).

The Oregon Supreme Court applied the common law discovery rule for accrual, as federal law requires, to determine the sole

question before it: whether "a reasonable jury could . . . have reached the conclusion that plaintiff reasonably did not discover the city's role in 1996." *T.R. v. Boy Scouts of America*, 344 Or. 282, 285 181 P.3d 758, 759 (Or. 2008); see also *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007).

The Court concluded that a reasonable jury could have concluded that Plaintiff acted reasonably by filing within the 2-year statute of limitations following the 2001 grand jury proceedings that led him to learn about the city's policy of deliberate indifference.

Plaintiff filed four claims initially, a state and a federal claim against the sexual perpetrator, Tannehill, and a state and later a federal claim against the city, the Petitioner. The sexual perpetrator's liability was based on the sexual molestation itself. The City's liability was based on its policy of deliberate indifference to the sexual abuse of children by its police officers.

A verdict was reached against Tannehill on the state claim. The claim fell within the statute of limitations, because Oregon applies a distinctive discovery rule to cases of child sex abuse. The claim does not accrue until the plaintiff discovers the causal connection between the child abuse and a subsequent injury. OR. REV. STAT. ANN. § 12.117 (West 2008); *Adams v. Oregon State Police*, 289 Or. 233, 237-39, 611 P.2d 1153 (Or. 1980). Tannehill did not appeal the verdict against him.

The federal claim against Tannehill did not go forward, because the federal discovery rule sets accrual at the time of discovery of the injury and the actions of the tortfeasor. Therefore, the statute of limitations accrued with respect to Tannehill at the time of the sexual molestation, and the 2003 filing was more than two years past that date.

The state law claim against the City was foreclosed by the Oregon Tort Claims Act (OTCA), which sets the state accrual rule for tort claims against state actors as of the date of the initial injury. OR. REV. STAT. ANN. § 30.275 (West 2008). The 2003 filing was beyond the 2-year statute of limitations if calculated from the date of the sexual molestation.

The only claim left, which is the subject of Petitioner's petition for certiorari, is the federal Sec. 1983 claim against the City. That claim is governed by this Court's rulings in *Wilson v. Garcia*, 471 U.S. 261, 267, 105 S.Ct. 1938, 1942 (1985), and *Owens v. Okure*, 488 U.S. 235, 236, 109 S.Ct. 573, 574 (1989), that Sec. 1983 actions use the forum state's residual statutes of limitations, plus relevant tolling provisions, and not any specialized tort statutes of limitation that might otherwise apply. Therefore, the accrual rules applied in the tort claim against Tannehill under the state's child sex abuse statute and under the OTCA are inapplicable. The general, residual personal injury statutes of limitations are determined by ORS 12.110. OR. REV. STAT.

ANN. § 12.110 (West 2008). They are accrued according to the common law rule of discovery: a plaintiff has two years past the time when he knew or should have known that the tortfeasor had acted in ways to harm him.

The issue before this Court is whether the jury acted reasonably in concluding that Plaintiff's 2003 filing on the deliberate indifference claim was timely under this rule of accrual.

The Court below held that the jury's conclusion was within the realm of reasonable conclusions based on the evidence and the common law discovery rule : "The city argues that a reasonable jury would *necessarily* have concluded from those facts that plaintiff should have known that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury could have reached that conclusion, we do not agree that that was the *only* conclusion a reasonable jury could have reached." *T.R. v. Boy Scouts of America*, 344 Or. 282, 296-97, 181 P.3d 758, 766 (Or. 2008) (emphasis added).

ARGUMENT

A. There Is No Justification for this Court to Grant Certiorari, Because the Oregon Supreme Court Applied the Appropriate Federal Standard for Accrual of Statutes of Limitations in Sec. 1983 Cases

The court below applied the required federal rule of accrual – a common law discovery rule that sets the time for filing a claim according to when the plaintiff knew of should have known of the injury and and of the cause of the harm. The discovery of these elements may differ for different defendants. The same common law rule applies under Oregon law, and, therefore, several Oregon cases explaining the principles of the common law rule were cited in the opinion below.[1] That is no basis for this Court to grant certiorari.

1. Federal law applies to determine the accrual of the statute of limitations under Sec. 1983

The date on which a plaintiff's federal action under Sec 1983 for a violation of the Fourteenth Amendment, including deliberate

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[1] The Petitioner quotes excerpts from the oral argument before the Oregon Supreme Court in an attempt to create the impression that the Oregon Supreme Court ignored the federal standard and applied a wholly different standard under state law. Pet. at 13-14. Given that they are the same, the argument is pointless.

indifference to child sex abuse, accrues is determined by federal law. "Aspects of §1983 which are not governed by reference to state law are governed by federal rules conforming in general to common-law tort principles." *Wallace v. Kato*, 127 S.Ct. 1091, 1095 (2007).

The federal rule of accrual applied in the vast majority of circuits is a discovery rule: the cause of action accrues when the plaintiff "knows or reasonably should have known" there is a government policy that has caused an injury. *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (statute of limitations does not accrue until plaintiff discovers, or by the exercise of reasonable diligence should have discovered, the cause of action); *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (same); *Genty v. Resolution Trust Corp.*, 937 F.2d 899 (3d Cir. 1991) (same); *Pete v. Metcalfe*, 8 F.3d 214 (5th Cir. 1993) (same); *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003) (same); *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006) (same); *White v. Garrison*, 70 F.3d 1276 (8th Cir.1995)(same); *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996) (same); *but see Nassim v. Warden, Md. House of Correction*, 64 F.3d 951, 955 (4th Cir.1995), *cert denied*, 516 U.S. 1177 (1996) (cause of action accrues when plaintiff has sufficient facts to create "duty to inquire").

2. The rule in Oregon of accrual for general liability claims is the same as the federal rule

The general personal injury liability rule in

Oregon employs the same common law accrual standard as the federal accrual rule. *Doe v. American Red Cross*, 322 Or. 502, 512 910 P.2d 364, 369 (Or. 1996) ("the statute of limitations begins to run when the plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that each of the three elements (harm, causation, and tortious conduct) exists") (quoting *Frohs v. Greene*, 253 Or. 1, 4, 452 P2d 564 (Or. 1969)); *Nieves v. McSweeney*, 241 F.3d 46, 52 (1st Cir. 2001) ("the statute of limitations runs separately from the occurrence of each civil rights violation that causes actual damage to the plaintiff (as long as the plaintiff knows or should have known of the injury)"); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (same); *Pete v. Metcalfe*, 8 F.3d 214 (5th Cir. 1993) (same); *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003) (same); *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (same); *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (same); *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir.1980), *cert. denied*, 450 U.S. 920 (1981) (same); *Lavellee v. Listi*, 611 F.2d 1129, 1131 (11th Cir. 1980) (same). Both reflect the common law discovery rule.

Moreover, the Oregon Supreme Court did not claim to be applying Oregon law *per se*, but rather referred to its cases to illuminate the same accrual principle present in federal and state law, saying "We set forth the *reason* for recognizing a discovery accrual rule in *Berry v.*

Branner," *T.R. v. Boy Scouts of America*, 344 Or. 282, 291, 181 P.3d 758, 763 (Or. 2008) (emphasis added). The Court below underscored that its discussion was not peculiar to Oregon law; noting that the Oregon discovery rule "mirrors the generally applicable common-law discovery rule," *Berry v. Branner*," *T.R. v. Boy Scouts of America*, 344 Or. 282, 292, 181 P.3d 758, 763 (Or. 2008)

This Court has articulated this same standard in cases involving Federal Tort Claim Act and RICO claims. The Oregon Supreme Court pointed to such cases when it noted that its conclusion is also consistent with this Court's view of the federal accrual rule – the key is whether the plaintiff knew or should have known the facts necessary to bring a claim. If not, the claim does not accrue. *T.R. v. Boy Scouts of America*, 344 Or. 282, 294, 181 P.3d 758, 764 (Or. 2008) (""that [the plaintiff] has been hurt" *and* "who has inflicted the injury" as "critical facts" that a plaintiff must know to start the statute of limitations running.") (quoting *U.S. v. Kubrick*, 444 U.S. 111, 122 (1979) (ignorance of legal significance of facts does not delay accrual of FTCA action)); *Rotella v. Wood*, 528 U.S. 549 (2000) (accrual starts when the person identifies the injury; psychiatric patient's RICO action was not delayed until he discovered alleged *pattern* of racketeering activity by known defendants).

Therefore, the correct standard was applied, regardless of the cases cited to explain the court's ruling. Whether one refers to

Oregon state law or federal law on this particular issue, the same common law rule would be applied and the result would have been the same.[2]

As the Oregon Supreme Court explained: "the statute of limitations does not begin to run until a reasonably prudent plaintiff perceives both the injury and the role that the defendant has played in that injury. *Schiele v. Hobart Corporation*, 284 Or. 483, 490, 587 P.2d 1010 (1978). In both respects Oregon law mirrors the generally applicable common-law discovery rule." *T.R. v. Boy Scouts of America*, 344 Or. 282, 291-92, 181 P.3d 758, 763 (Or. 2008).[3]

3. The Petitioner's objection at base is that it disagrees with the jury's factual conclusion regarding the reasonableness of the Plaintiff's discovery of the deliberate indifference of the Petitioner's police force to child sexual abuse

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[2] *Plumeau v. School Dist. No. 40 County of Yamhill*, 130 F.3d 432 (9th Cir. 1997), relied upon by petitioners, articulates the same discovery rule. Moreover, in that case, the filing was assumed timely, and the court addressed the Sec. 1983 claim on the merits.

[3] Having lost on the proper accrual rule standard, Petitioner tries to displace settled law with selected quotations referring to "a complete and present cause of action." Pet. at 15, 17. Petitioner is obviously trying to argue that Plaintiff was required to follow the rejected rule that every conceivable cause of action against every must be filed at the same time – even when the plaintiff does not know of the injury or identity of the tortfeasor, as Plaintiff in this case did not.

by its officers

What the plaintiff knew and whether the timing of his claims against the government was reasonable were questions of fact for the jury. A jury's determination of the facts merits considerable deference. As the Oregon Supreme Court noted, "[t]he city argues that a reasonable jury would necessarily have concluded from those facts that plaintiff should have known that the city was responsible for Tannehill's acts, or at least investigated its potential liability. Although we agree that a reasonable jury could have reached that conclusion, we do not agree that that was the only conclusion a reasonable jury could have reached." *T.R. v. Boy Scouts of America*, 344 Or. 282, 296-97, 181 P.3d 758, 766 (Or. 2008).

The Oregon Supreme Court further correctly concluded that "based on the evidence in this record, a reasonable jury could have found that, under the circumstances existing in 1996, plaintiff acted reasonably in not undertaking an investigation of whether the city itself had caused him harm." *T.R. v. Boy Scouts of America*, 344 Or. 282, 298, 181 P.3d 758, 767 (Or. 2008). Petitioner has failed to present any argument that justifies this Court's attention.

CONCLUSION

Petitioner has attempted to create the illusion of legal error where there is none.

There is no reason for this Court to grant certiorari to review the decision below. For the foregoing reasons, the petition for the writ of certiorari should be DENIED.

Respectfully submitted,

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No. 07-1553

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In The

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CITY OF THE DALLES,
a political subdivision of the State of Oregon,

Petitioner,

v.

T.R.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Oregon

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. Plaintiff is Bound by his Judicial Admissions that his Section 1983 Claim is Time-Barred by the Federal Accrual Rules.

Plaintiff has already conceded that the federal accrual law is different than Oregon's accrual law; and that under the federal accrual law, his Section 1983 claim is time-barred.

Ever since the decision by the Court of Appeals for the State of Oregon, the plaintiff has always taken the position that his Section 1983 claim is time-barred by an application of the federal accrual rule, but that the Court of Appeals decision was incorrect – and his claim is not time-barred – because the Court of Appeals failed to apply Oregon's accrual law as a tolling provision. For example, in his Petition for Reconsideration filed in the Court of Appeals for the State of Oregon, the plaintiff set forth the following argument:

> "Plaintiff's [sic] raises three errors on reconsideration. The first springs from the subtle but significant distinction between 'accrual' of a 42 U.S.C. Section 1983 ('Section 1983') action under federal law and the 'tolling' of that claim under state law. While accrual is governed by federal principles, the Oregon discovery rule operates as a tolling provision for ORS 12.110(1) – the statute of limitations by which Section 1983 claims are governed in Oregon. This distinction between accrual

> under federal law and the application of Oregon's 'discovery rule' to toll the statute of limitations under Oregon law is vital to the resolution of this matter, because actions brought pursuant to Section 1983 use a state's general tort statute of limitations ***plus*** operative state law tolling provisions. But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule, ***without considering the tolling effect of Oregon's discovery rule***, the opinion was in error." (Emphasis in Original). (App. 3 to App. 4).

As indicated above, in Plaintiff's Petition for Reconsideration to the Court of Appeals for the State of Oregon, the plaintiff agreed that his claim was time-barred by application of the federal accrual rule: "But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule. . . ." (App. 3).

In other words, the plaintiff's position in the Court of Appeals and in the Supreme Court for the State of Oregon was that the federal accrual rule barred his claim. But, the Oregon accrual rule did not bar his claim. And, because the Oregon accrual rule, as a tolling provision, "trumped" the federal accrual rule, his claim was not time-barred.

Another example of plaintiff's concession that the federal accrual rule bars his Section 1983 claim is under the "Questions Presented on Reconsideration" portion of his petition for reconsideration in the Court

of Appeals for the State of Oregon. Under heading A., the plaintiff states: "Does the Oregon discovery rule . . . serve to toll the running of the statute of limitations in a Section 1983 suit **following federal accrual of the claim?"** (Emphasis Supplied). (App. 6).

In other words, the question the plaintiff was presenting to the Court of Appeals was that once the plaintiff's Section 1983 claim accrued under federal law, did Oregon's accrual law "toll" the application of the federal accrual law by allowing a longer time for the plaintiff to file his claim. If the federal and Oregon accrual rules are the same, as the plaintiff now contends for the first time, the accrual of the claim would be the same date under federal and Oregon law; and there would be no need for the Oregon accrual rule to "toll" the application of the federal accrual rule.

Another example that the plaintiff has conceded that his claim is barred by the federal accrual law appears under the heading in the Petition for Reconsideration entitled "Argument on Reconsideration." The first sentence of that argument is as follows: "Plaintiff respectfully asserts that the failure of this Court to consider the impact of Oregon's discovery rule on the tolling of the statute of limitations in Plaintiff's Section 1983 suit, **after accrual**, was error for three reasons. . . ." (Emphasis Supplied). (App. 8).

And, as pointed out by the plaintiff later in his argument: "However, 'accrual' is merely the point at

which the statute of limitations ***begins*** to run for a 1983 claim. It can be, and often is, further tolled under state law." (Emphasis in Original). (App. 11).

Now for the first time in these proceedings as argued in his Brief in Opposition to the City's Petition for a Writ of Certiorari, the plaintiff is contending that the federal accrual law and the Oregon accrual law are the same. If from the beginning, the plaintiff felt that the federal accrual law and the Oregon accrual law were the same, then why did the plaintiff argue that the Court of Appeals and the Supreme Court of Oregon had to apply the Oregon accrual law as a tolling provision. If the accrual laws were the same, there would be no reason or need to apply Oregon's accrual rule at all, much less as a tolling provision.

Plaintiff has conceded that his Section 1983 claim is time-barred, and he is now barred to contend that the federal accrual law and Oregon's accrual law rules are the same in order to persuade this Court that the City's Writ should not be granted. The Court of Appeals for the State of Oregon correctly applied the federal accrual rule, and not Oregon's accrual rule, with the end result that plaintiff's Section 1983

claim is time-barred under the federal accrual rule, just as the plaintiff has previously conceded.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF OREGON

T.R., Plaintiff-Respondent, Cross-Appellant, v. THE BOY SCOUTS OF AMERICA, a congressionally chartered corporation, authorized to do business in Oregon; CASCADE PACIFIC COUNCIL, BOY SCOUTS OF AMERICA, an Oregon non-profit corporation; and JAMES DONALD TANNEHILL, Defendants below, and CITY OF THE DALLES, OREGON, a political subdivision of the State of Oregon, Defendant-Appellant, Cross-Respondent.	) Multnomah County) Circuit Court) Case No. 0206-05750) **CA A125742**

PLAINTIFF-RESPONDENT, CROSS-APPELLANT'S PETITION FOR RECONSIDERATION

Opinion of this Court filed April 19, 2006
Appeal from the Judgment entered August 16, 2004,
and the Supplemental Judgment
entered January 6, 2005
Multnomah County Circuit Court of the State
of Oregon, the Honorable Alicia Fuchs, Judge

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* * *

who were also there to testify. Tr. at 977-983. It began to dawn on Plaintiff that Tannehill's activities had not been completely secret – that City officials may have known or had reason to know of Tannehill's proclivities. During the course of Tannehill's criminal trial, Plaintiff's symptoms escalated to such a degree that he became concerned about the effect Tannehill's abuse had on his life and sought professional help, including legal consultation.

4. Plaintiff brought this suit in June of 2002, approximately nine months after he had made the discoveries referred to in paragraphs 2 and 3, above.

5. This Court held that as a matter of law under *United States v. Kubrick,* 444 U.S. 111 (1979), and other cases, that "only one conclusion" could be drawn from the facts above – "any reasonable person would have acted on those facts" and brought suit against the City within two years of the abuse.

B. OVERVIEW OF THIS MOTION

Plaintiff's [sic] raises three errors on reconsideration. The first springs from the subtle but significant distinction between "accrual" of a 42 U.S.C. Section 1983 ("Section 1983") action under federal law and the "tolling" of that claim under state law. While accrual is governed by federal principles, the Oregon discovery rule operates as a tolling provision for ORS 12.110(1) – the statute of limitations by which Section 1983 claims are governed in Oregon. This distinction between accrual under federal law and the application of Oregon's "discovery rule" to toll the statute of limitations under Oregon law is vital to the resolution of this matter, because actions brought pursuant to Section 1983 use a state's general tort statute of limitations ***plus*** operative state law tolling provisions. But because this Court's opinion declaring Plaintiff's case untimely only applied the federal accrual rule, ***without considering the tolling effect of Oregon's discovery rule***, the opinion was

in error. Seen in this light, it is also apparent that the United States Supreme Court's stated policy reasons for its reasoning in *United States v. Kubrick* do not apply in the child abuse context.

Second, well-established mental health phenomena make plain that Plaintiff in this case was in no position to recognize his "injury" – let done reasonably be expected to "discover" or communicate with a professional about a legal claim – in the time allotted by the *Kubrick* accrual doctrine. Stated plainly, child sexual abuse itself creates a barrier and prevents a victim from personally dealing with the abuse or discussing it with others. Thus, accrual under *Kubrick* cannot logically or fairly be applied to sexual abuse in a Section 1983 claim; it is simply a different kind of case.

Third, only by using the mental health realities of the child abuse context and the Oregon discovery rule can the Ninth Circuit precedent of *Plumeau v. School Dist. No. 40 County of Yamhill,* 130 F.3d 432 (9th Cir 1997) – holding that a minor student's Section 1983 claim was timely filed seven to ten years after her sexual abuse by a school janitor – be squared with *Kubrick* and the Ninth Circuit accrual case of *Dyniewicz v. United States,* 742 F.2d. 484, 486 (9th Cir.1984), both of which hold that the accrual of federal claims begins at the moment where a claimant becomes aware of a physical injury and its immediate cause.

Plaintiff recognizes that petitions for reconsideration based on "legal issues already argued in the parties' briefs and addressed by the Court of Appeals are disfavored." ORAP 6.25(1)(e). These specific legal issues, however – including the specific points on which this Court's opinion hinge – were not directly discussed in the briefing below, though *Kubrick* was cited by Plaintiff in the discussion concerning when a Section 1983 claim accrues. The general issue of the statute of limitations was also discussed in briefing below, but this Court's opinion focused squarely on the impact of *Kubrick* without considering cases relating to the question of accrual versus tolling. Also, given the rulings below related to Plaintiff's discovery of his claims against the City, there was no argument needed to explain the nature of delayed discovery in child abuse cases or in this case in particular. Thus, the issue of how the Oregon discovery rule affects the tolling of the statute of limitations for Plaintiff's Section 1983 claim was not briefed or argued either in this Court or below. Additionally, there has been nothing in the way of argument or briefing concerning the policy considerations that drove *Kubrick,* the distinct nature of child sexual abuse and its psychological effect on children and the resulting implications for the accrual of claims under Section 1983, or the impact of psychological avoidance mechanisms arising from child abuse the details of the Ninth Circuit ruling in *Plumeau.*

II. Questions Presented on Reconsideration

A. Does the Oregon discovery rule – applicable to ORS 12.110(1) under *Berry v. Branner*, 245 Or. 307, 421 P.2d 996 (1966) – serve to toll the running of the statute of limitations in a Section 1983 suit following federal accrual of the claim?

B. Do the psychological realities of child abuse, whereby a child sexual abuse victim is faced with avoidance mechanisms brought about by the abuse itself, prevent the application of an accrual doctrine of the type set out in *Kubrick* and its progeny and applied by the Court here, given the stated policy considerations underlying the reasoning in those cases?

C. Can the facts and holding of *Plumeau* be squared with this Court's opinion concerning accrual, as well as *Kubrick* and *Dyniewicz* in light of the seven year delay in bringing suit by the *Plumeau* plaintiff, when the only tolling provision applicable to that case – other than the discovery rule or a recognition of the avoidance mechanisms of child sexual abuse – limited tolling of an accrued claim to a period of five years at most?

III. Concise Summary of Argument

A. The discovery rule in Oregon is considered to be a tolling provision as well as a rule of accrual. Because Section 1983 claims incorporate state law tolling rules, the Oregon discovery rule operates and

serves to make Plaintiff's delayed discovery of the cause of action against Defendant City of the Dalles reasonable and legally permissible.

B. Sexual abuse of a child by a trusted adult triggers various psychological avoidance mechanisms that prevent child sex abuse victims from facing the reality of their abuse and its impact on their emotional and mental health, ofttimes for decades after the abuse ends. Although they may be aware of the fact of the abuse itself, child sexual abuse victims cannot be said to have knowledge of the legal "injury" at the time of the abuse for purposes of the accrual of legal claims.

C. Because the minority tolling provisions extend the relevant statute of limitations only for five years, and because no other tolling provision would appear to apply to ORS 12.110 except for the discovery rule, the delay of seven years between the last instance of abuse in *Plumeau* and the filing of *Plumeau's* Section 1983 suit would appear untimely. Because the Ninth Circuit held *Plumeau's* filing to be timely based on discovery at the time of the victim-plaintiff's emotional breakdown, one must conclude that the Ninth Circuit has applied Oregon's discovery rule as a tolling provision to Section 1983 claims. This Court should do likewise in Plaintiff's case.

IV. ARGUMENT ON RECONSIDERATION

Plaintiff respectfully asserts that the failure of this Court to consider the impact of Oregon's discovery rule on the tolling of the statute of limitations in Plaintiff's Section 1983 suit, after accrual, was error for three reasons – first, it failed to account for the application of the Oregon discovery rule as a tolling provision; second, it failed to recognize the psychological realities of child abuse which inform a plaintiff's knowledge of injury, and third, without the discovery rule, the precedent of *Plumeau* makes little logical sense. This brief addresses these issues in turn. However, a discussion of the structure of Section 1983 and the accrual/tolling/statute of limitations distinction is necessary as a preliminary matter.

A. *APPLICATION OF THE DISCOVERY RULE TO PLAINTIFF'S CLAIM*

1. *The Structure of Section 1983*

The United States Supreme Court has noted that the purpose of Section 1983 is to provide compensatory relief to those deprived of their federal rights by state actors. *Felder v. Casey,* 487 U.S. 131, 141 (1988). While Section 1983 is a federal statute providing a civil cause of action for the violation of constitutional rights, there are virtually no procedural rules in federal law that govern the operation or timeliness of a Section 1983 cause of action. *Board of Regents of University of State of N. Y. v. Tomanio,* 446 U.S. 478,

* * *

169 F.3d 608, 610 (9th Cir. 1999) ("we apply the state's general residual statute of limitations and state rules which toll the running of that statute"). "Tolling" means to "suspend or stop temporarily[,] as the statute of limitations is tolled . . . during the plaintiffs minority." BLACK'S LAW DICTIONARY 1488 (7th ed.1999). In addition to minority, Oregon law also provides for, among other tolling periods, tolling during periods of insanity.[2] *See* ORS 12.160. Tolling for minority and insanity is limited under Oregon law to five years after the claim accrues, but during the time that one is a minor or under age, the statute of limitations will not run on the person's claim. It is Section 1983's appropriation of tolling doctrines that is at issue in this petition for reconsideration. However, one must first must [sic] establish when ORS 12.110(1) began to run in this case before examining its tolling. The first step therefore is to establish when ORS 12.110(1) began to run – *i.e.* when Plaintiffs claim "accrued."

2. *Accrual of a Claim in Section 1983 Cases*

"Accrual" means when an action may be maintained on a particular cause; that is, a claim accrues at the point "whenever one person may sue another." *Berry v. Branner*, 245 Or at 311-12; BLACK'S LAW

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[2] The tolling provisions for incarceration formerly found in ORS 12.160 were removed by the Legislature in 1997.

DICTIONARY 21 (7th ed.1999). "Federal law determines when a cause of action accrues and [therefore when] the statute of limitations begins to run for a § 1983 action." *Elliott v. City of Union City*, 25 F.3d 800, 801-02 (9th Cir 1994) (citation omitted). For example, in *Kubrick,* accrual occurred when a plaintiff went deaf from a dose of antibiotics and knew that the antibiotics caused the deafness, not when he learned that the application of antibiotics was medical malpractice. *Kubrick*, 444 U.S. at 118.[3]

Indeed, as noted by this Court in its opinion in this case – and not challenged in this motion – under federal law a claim accrues, and the statute of limitations begins to run "when the plaintiff knows, or should know, of the injury which is the basis of the cause of action." *Johnson v. State of California*, 207 F.3d at 653, *citing Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir. 1996); *See also United States v. Kubrick,* 444 U.S. at 113; *Dyniewicz v. United States,* 742 F.2d at 486 (9th Cir.1984) (Federal Tort Claims Act claims untimely where decedents' children filed only after they discovered negligence more than two years after accident, because immediate physical cause of the injury (the accident) was discovered at the time it

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[3] It should be noted that even under *Kubrick,* accrual is subject to a federal "discovery rule." *Kubrick*, 444 U.S. at 120 ("the general rule . . . has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that in medical malpractice cases the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause")

occurred; ignorance of the involvement of United States employees is irrelevant to accrual). However, "accrual" is merely the point at which the statute of limitations ***begins*** to run for a 1983 claim. It can be, and often is, further tolled under state law.

3. *Tolling of the Statute of Limitations under Section 1983*

As noted above, Section 1983 cases are governed not only by state residual tort statutes of limitation, but also by any tolling provisions found in state law that relate to that statute of limitations. *See* 42 U.S.C. § 1988; *Hardin v. Straub*, 490 U.S. at 544 (applying Michigan's incarceration tolling provision); *Board of Regents, Univ. of N. Y. v. Tomanio,* 446 U.S. at 490-91 (applying New York's absence of a tolling provision for pursuing related litigation in separate courts). *See also Elliott v. City of Union City,* 25 F.3d 802-03 (applying California's incarceration tolling provision). Applicable tolling provisions in Section 1983 are not confined to statutory provisions, but may include common law tolling doctrines. *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 694 (9th Cir 2003) (applying California's common law equitable tolling provision). This is what distinguishes the precedents of *Johnson, Kimes, Kubrick* and *Dyniewicz* – all involving Federal Tort Claims Act causes of action which do not incorporate state tolling provisions – from Plaintiff's Section 1983 claim. Because Section 1983 utilizes state tolling provisions, the answer to

the accrual question is not the final word on a timeliness question as it is under the Federal Tort Claims Act. With that, Plaintiff turns to the question of the discovery rule as a tolling provision under Oregon law.

4. *The Oregon Discovery Rule Applies to ORS 12.110(1), and Operates Both as an Accrual Provision As Well As a Tolling Provision.*

The discovery rule under federal law concerns accrual only and requires that "plaintiff has discovered both his injury and its cause" before a claim will accrue. *Kubrick*, 444 U.S. at 120. Yet the discovery rule in Oregon both delays accrual and "has the effect of tolling the commencement of [statutes of limitation] under certain circumstances." *F.D.I.C. v. Smith,* 328 Or. 420, 428, 980 P.2d 141 (1999). For instance, the Oregon discovery rule allows a Plaintiff to bring suit a decade after child abuse if the plaintiff discovers the causal connection between abuse and later psychological problems and files suit within the statutory period for doing so. *See Jasmin v. Ross*, 177 Or App 210,

* * *